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In The

Supreme Court of the United States

October Term, 1994

TED SAKAI, *Administrator, Halawa Correctional Facility, in his Official and Individual Capacity, et al.*,

Petitioners,

vs.

TERRY SMITH, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MARGERY S. BRONSTER
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
First Deputy Attorney General
State of Hawaii
**Counsel of Record*

Department of the
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1292

Counsel for Petitioners
Ted Sakai, Administrator,
Halawa Correctional Facility,
in his Official and
Individual Capacities, et al.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

1. Whether a state maximum security inmate's rights of "access to the courts" under *Bounds v. Smith*, 430 U.S. 817 (1977), are not violated by state prison officials when:

a. The underlying pleadings the inmate sought to file in state court, and as to which the claim of federally wrongful denial of access is made, are frivolous;

b. The inmate, at worst, has suffered only "mere delay" in presentation of his pleadings to a state court;

c. The state has provided competent legal counsel to the inmate, and counsel has refused to file for the relief sought on the basis of counsel's belief that there is no ground for the relief; *or*

d. Access to the state judicial forum allegedly was denied because the inmate was prevented by the prison officials from complying with state procedural rules, but the prisoner failed to exhaust meaningful and available state court processes for obtaining judicial relief from those procedural mandates?

2. Whether the courts below erred in refusing to direct summary judgment for Petitioners on qualified immunity grounds?

PARTIES TO THE PROCEEDINGS

Petitioners include Ted Sakai, Administrator, Halawa Correctional Facility, State of Hawaii, and various other officials of the Department of Corrections, State of Hawaii (now the Department of Public Safety), all of whom were named as defendants below. Petitioners include Harold Falk, John Cabral, Clayton Frank, Adele Fujita, Leonard Gonsalves, Leiann Kairiikaua, Gary Kaplan, Gerald Mendiola, Cinda Sandin, Francis Sequiera, Laurence Shohet, William Oku, Malcolm Lee, Terrence Allen, and Ray Suenaga, all of whom were sued below in both their official and individual capacities, and who appear here in those capacities. Respondents include Terry Smith, and John Allen, inmates at Halawa Correctional Facility at the times at issue, and plaintiffs in the action below. Mr. Smith is the principal respondent, inmate Allen having no claims that were allowed to proceed to trial, and no standing in the Court of Appeals to defend against Petitioners' appeal of the denial of their motion for summary judgment based on qualified immunity.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 13

A. Review Should Be Granted to Correct the Ninth Circuit's Mandate that Triable Issues Remain upon Respondent's Theory that States, under *Bounds v. Smith*, Must Affirmatively Assist State Prison Inmates in Filing Frivolous Suits 15

B. Review Should Be Granted to Correct the Ninth Circuit's Implicit Holding that "Mere Delay" in the Presentation of a State Court Lawsuit Can Give Rise to a Claim under *Bounds v. Smith*, a Holding that is in Direct Conflict With Rulings in at Least Seven of the Federal Courts of Appeals 18

TABLE OF CONTENTS – Continued

Page

C. Review Should Be Granted to Correct the Ninth Circuit's Unprecedented Denigration of the Role of Appointed Counsel in Filtering Frivolous from Nonfrivolous Suits 20

D. Review Should Be Granted to Correct the Ninth Circuit's Broad Denigration of the Role of the State Judiciary in Providing Access to the Courts Notwithstanding Procedural Rules and their Impact on Inmates Whose Activities Are Subjected to Close Regulation Due to Security Concerns 21

E. Review Should Be Granted to Correct the Ninth Circuit's Undue Constriction of the Protections of *Harlow* Immunity 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Creighton, 483 U.S. 635 (1987) 23

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 22

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 17

Bounds v. Smith, 430 U.S. 817 (1977) ..... *passim*

Burlington Northern R. Co. v. Woods, 480 U.S. 1 (1987) 17

Burns v. Reed, 500 U.S. 478 (1991) 13, 15

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 17

Cookish v. Cunningham, 787 F.2d 1 (1st Cir. 1986) 19

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 18

Farmer v. Brennan, 114 S. Ct. 1970 (1994) 24

Grady v. Wilken, 735 F.2d 303 (8th Cir. 1984) 19

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 14, 15

Hopkins v. Wallace, 751 F.2d 1161 (11th Cir. 1985) 19

Hudson v. Robinson, 678 F.2d 462 (3d Cir. 1982) ... 12, 19

Hunter v. Bryant, 112 S. Ct. 534 (1991) 24

Hutto v. Davis, 454 U.S. 370 (1982) (per curiam) 15

Johnson v. Parke, 642 F.2d 377 (10th Cir. 1981) 13

Jones v. Franzen, 697 F.2d 801 (7th Cir. 1983) 19

Lincoln v. State, 66 Haw. 566, 670 P.2d 1263 (1983) .. 7, 16

TABLE OF AUTHORITIES – Continued

Page

Magee v. Waters, 810 F.2d 451 (4th Cir. 1987) 19

Malley v. Briggs, 475 U.S. 335 (1986)..... 15

Mann v. Smith, 796 F.2d 79 (5th Cir. 1986)..... 19

McDonald v. Smith, 472 U.S. 479 (1985).....12, 17

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 22

Mitchell v. Forsyth, 472 U.S. 511 (1985) 3, 11, 14, 17, 23, 24

Pennsylvania v. Finley, 481 U.S. 551 (1987) 21

Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987).....21, 22

Sands v. Lewis, 886 F.2d 1166 (9th Cir. 1989)..... 19

Siegert v. Gilley, 500 U.S. 221 (1991)..... 11, 15, 16, 17

Smith v. Murray, 477 U.S. 527 (1986) 23

State v. Smith, 69 Haw. 684 (1985)..... 5

Turner v. Safley, 482 U.S. 78 (1987) 22

United States v. MacCollom, 426 U.S. 317 (1976) ...12, 18

United States v. Mendoza, 464 U.S. 154 (1984) 14

CONSTITUTION, STATUTES AND LEGISLATION:

First Amendment.....3, 12, 13, 17, 24

Eighth Amendment.....9, 11, 24

Fourteenth Amendment..... 3

28 U.S.C. § 1254..... 2

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1257 8

28 U.S.C. § 1291 3

28 U.S.C. § 1331(a) 3

28 U.S.C. § 1343(3) 3

28 U.S.C. § 2254 10

Haw. Rev. Stat. § 353(b)(1) (1985 & Supp. 1992) 5

Haw. Rev. Stat. Ch. 602 3

Haw. Rev. Stat. § 602-5 ..... 3, 22

Haw. Rev. Stat. Ch. 603 3

Haw. Rev. Stat. § 603.21.9 ..... 4, 6, 22

COURT RULES:

Fed. R. App. P. 40 ..... 2, 18

Haw. R. Cir. Ct. 3(a) 4, 8

Haw. R. Cir. Ct. 33 ..... 4, 6

Haw. R. Cir. Ct. 33(c) 6

Haw. R. Cir. Ct. 33(d)(1) 6

Haw. R. Cir. Ct. 33(d)(2) 6

Haw. R. Penal Proc. 40 ..... 4, 5, 6, 10, 12, 15, 18

Haw. R. Penal Proc. 40(c) 6

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Ted Sakai, *et al.,* in their official and individual capacities, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on November 15, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 40 F.3d 1001 (9th Cir. 1994), and is reprinted in Appendix ("Pet. App.") "A."

The order of the District Court denying summary judgment in part is unreported and is reprinted in Pet. App. "B." The report and recommendations of the Magistrate are reprinted in Pet. App. "C."

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on November 15, 1994, and the time in which this Petition may be filed extends at least to and including February 13, 1995, and this Petition is timely.[1] Jurisdiction in the District Court was alleged to

[1] A petition for rehearing and suggestion of the appropriateness of rehearing en banc seeking relief from all adverse aspects of the Ninth Circuit's judgment was dispatched on November 28, 1994, by private air courier for filing the next day. According to documents received by the Department of the Attorney General from its courier, authenticated copies of which shall be lodged separately, the Office of the Clerk of the Court of Appeals received the petition and suggestion on November 29, 1994, thereby tolling the time in which to file this Petition. However, according to the docket of the Ninth Circuit, the petition for rehearing and suggestion of appropriateness of rehearing en banc was not filed until November 30, 1994. No order has yet issued with respect to the petition for rehearing and suggestion of the appropriateness of rehearing en banc, and no mandate has issued. As requested *infra*, the Court may wish to await the resolution of Petitioners' petition below pursuant to Fed. R. App. P. 40, which apparently has been treated as timely by the Court of Appeals, and which may moot or reshape the decision of the Ninth Circuit. In any event, this Petition is timely, inasmuch as the case below properly is "in" the Court of Appeals pursuant to 28 U.S.C. § 1254, and this Court has concurrent jurisdiction over the case for that reason.

have been conferred pursuant to 28 U.S.C. §§ 1331(a) and 1343(3). Jurisdiction in the Court of Appeals lay pursuant to 28 U.S.C. § 1291 and the "collateral order" doctrine. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985). Jurisdiction lies here under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution provide in relevant part that:

> Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.
>
> [No State shall] deprive any person of life, liberty, or property, without due process of law.

Chapters 602 and 603, Hawaii Revised Statutes (1985), provide in relevant part that:

> *§ 602-5 Jurisdiction and powers.* The supreme court [of the State of Hawaii] shall have jurisdiction and powers as follows:
>
> . . .
>
> (6) To make or issue any order or writ necessary or appropriate in aid of its appellate or original jurisdiction, and in such case any justice may issue a writ or an order to show cause returnable before the supreme court.
>
> (7) To make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other

> acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.
>
> § *603-21.9 Powers.* The several circuit courts shall have power:
>
> (1) To make and issue all orders and writs necessary or appropriate in aid of their original or appellate jurisdiction:
>
> . . .
>
> (6) To make and award such judgments, decrees, orders, and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them.

Rule 3(a) of the Rules of the Circuit Courts of the State of Hawaii provides in relevant part that:

> . . . . Signatures and all other handwritten entries on papers shall be in black ink.

Rule 33 of the Rules of the Circuit Courts of the State of Hawaii, and Rule 40 of the Rules of Penal Procedure of the State of Hawaii, in effect during the period relevant to this case, are reprinted in Pet. App. "D."

STATEMENT OF THE CASE

1. Halawa Correctional Facility is the only maximum security correctional facility in the Hawaii penal system. By law, Halawa is charged with providing "extensive control and correctional programs for categories of persons who cannot be held or treated in other correctional facilities." Haw. Rev. Stat. 353(b)(1) (1985 & Supp. 1992). Respondent Hawaii inmate Terry Smith was incarcerated in the Hawaii penal system beginning September 26, 1980, after being convicted of attempted murder. Decl. of Cinda Sandin at 2 (Exh. "A" to Clerk's Record ("CR") 411). Smith was a pimp who shot a competitor four times at point blank range in a nightclub in a dispute over "rights" to a particular prostitute. *Id.* He was sentenced to twenty years in prison, and, after being incarcerated, continually disobeyed prison rules, and was found guilty by prison disciplinary committees of dozens of violations of regulations barring assault, fighting, lying, refusing to obey orders, counterfeiting documents, destroying property, and other matters. *Id.* 3. As a result of this behavior, Smith was transferred to Halawa on September 16, 1985. *Id.* Nine days later, the Supreme Court of Hawaii affirmed the denial of Smith's first state court petition for post-conviction relief pursuant to Haw. R. Penal P. 40. *See State v. Smith*, 69 Haw. 684 (1985); Exh. 3908, CR 371.

2. In May, 1986, Smith attempted to file a second post-conviction petition in the Circuit Court for the First Circuit, located in Honolulu (Exh. 3911: CR 371). That petition was returned to Smith by a "Court Documents Supervisor" "because of not having enough copies." *Id.* Although the state court's general form for preparing

such petitions stated that "the original and two copies must be mailed to the Clerk" (Pet. App. "D" (form line 7)), the form did not state that the petition would not be docketed without multiple copies, and Rule 40 itself did not mandate a specific number of copies and only required that "[t]he petition shall be in substantially the form annexed to these rules." Rule 40(c), Haw. R. Penal P, Pet. App. D-7. Smith made no application of any kind to the Circuit Court under its all-writs authority, *see* Haw. Rev. Stat. § 603-21.9, *supra* pp. 3-4, for a waiver of any requirement of multiple copies. Nevertheless, Smith's petition was ultimately filed and was denied by a "final order" on July 16, 1986, not more than ten weeks after it was returned by the documents supervisor. Exh. 3907, CR 371. In between the time of filing and disposition, Smith's petition was subject to the processes outlined in Circuit Rule 33 and Penal Rule 40. Under Circuit Rule 33, "in any case where the prisoner requests a court-appointed counsel or intends to proceed pro se, the documents section shall transmit a copy of the Petition to the public defender[.]" Haw. R. Cir. Ct. 33(c). Once the Public Defender "[d]etermine[s] whether the Petition is or is not meritorious," and states whether he or she "will represent the prisoner," the Court must make "an independent determination whether the Petition is or is not meritorious." *Id.* 33(c) and (d)(1) and (2). If both the Public Defender and the Court find the Petition frivolous, the Court must "enter an order and that order shall terminate the consideration of that SPP case file at the trial level." *Id.* 33(d)(1). According to the Hawaii Supreme Court:

> If a petition alleges facts that if proven would entitle the petitioner to relief, the court

> shall grant a hearing which may extend only to the issues raised in the petition or answer. However, the court may deny a hearing if the petitioner's claim is patently frivolous and is without trace of support either in the record or from other evidence submitted by the petitioner. The court may also deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held at the original trial or at any later proceeding.

Lincoln v. State, 66 Haw. 566, 567, 670 P.2d 1263, 1263 (1983). In a letter to Smith, sent after Smith attempted to docket an appeal from the denial of his second Rule 40 petition, and explaining why the Supreme Court of Hawaii would not appoint counsel on appeal, Justice Padgett explained to Smith that:

> [T]he records show that the public defender's office, pursuant to RCCH 33(c), made a determination that the petition was not meritorious but that you were indigent and indicated that it could not serve as counsel for you because of differences with you. The court below then dismissed your petition without a hearing. In order to do so, the court below had to make a determination that your claim was patently frivolous and without a trace of support either in the record or from other evidence submitted by your under HRPP 40(f). The same determination governs the appointment of counsel under HRPP 40(i).[2]

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[2] The state Supreme Court Justice concluded his letter to Smith by observing that "the trial court, and not the Supreme Court, was the proper place for you to seek appointment of counsel on the appeal," and "[t]herefore, this court will not appoint counsel for you in the present appeal." See CR 371.

3. Smith's original notice of appeal from the July 16, 1986 order was returned to him on September 9, 1986, by the same "Documents Supervisor" who had returned Smith's petition for lack of copies. Exh. 3909 (CR 371). The supervisor noted that Circuit Court Rule 3 required that "[a]ll written entries shall be in permanent black ink and legible." *Id.* Although the notice of appeal had been "sent up to the Administrative Judge of the Criminal Division" "for his review and direction," *id.*, Smith at no time within the 30-day period for filing the notice of appeal requested relief from the "black-ink" rule, either at the Circuit Court or the appellate court level. Nor did Smith seek relief thereafter from the Clerk's refusal to docket the appeal. Although Smith did manage to have a notice of appeal filed on September 17, 1986, the Supreme Court of Hawaii, on December 8, 1986, granted the County Prosecutor's unopposed motion to dismiss the appeal as untimely. Exh. 3907 (CR 371). Smith did not seek review under 28 U.S.C. § 1257.

4. Petitioners submitted evidence below explaining that, as a general matter, "[i]ndigent inmates are and always have been given free paper, envelopes, postage and xeroxing to pursue their legal matters," Sandin Decl. ¶ 16 (CR 411), and that inmates were always free to purchase xerox copies with funds in their prison accounts. *Id.* Smith admitted that he squandered his prison funds on "cosmetics" and "cigarettes," CR 417, and thus had no money to pay for copies. As to the matter of providing black-ink pens, prison officials submitted a sworn declaration that, although pens were made available during the hours when more guards were on duty, pens were viewed as dangerous as they could be

used as weapons, for tattoos (a means by which gang members identified themselves), or for hiding contraband. Sandin Decl. ¶ 18 (CR 411). Pencils were less dangerous as they could not be used for tattoos or hiding contraband, and their length (and their utility as weapons) could be controlled. *Id.*

5. Smith filed this action in the United States District Court for the District of Hawaii on August 20, 1986, and it became the vehicle for litigating Smith's claims that, with respect to his second state court petition for post-conviction relief, he had been denied his rights of reasonable access to the courts under this Court's decision in *Bounds v. Smith*, 430 U.S. 817 (1977).[3] *See* Pet. App. B-6, B-9. Petitioners, State officials who were sued both in their official and individual capacities for damages, moved for summary judgment on the merits, and under the doctrine of qualified officer's immunity. Accepting the Magistrate Judge's report and recommendations, the District Court (Kay, J.), held that Smith's *Bounds* claims had sufficient merit to require a trial, even if Smith's underlying Rule 40 petition was indeed frivolous. According to the court, "[t]he issue here is not the merit

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[3] Smith also used the August 20, 1986 complaint to litigate issues surrounding an alleged denial of out-of-cell exercise during a six-week period in 1988. During the time relevant to this issue – litigated under the Eighth Amendment – Smith was housed in the Special Holding Unit at Halawa. Inmates in the SHU were permitted, for security and rehabilitative reasons, only to exercise alone when out of their cells. Sandin Decl. at 17 (CR 411). Although the goal was to allow each inmate in the SHU up to one hour of exercise per day, *id.*, evidence in the record indicated that, during a six-week period in 1988, Smith received outdoor exercise only once a week. *See* Pet. App. B-14.

of the appeal, but whether Defendants' actions resulted in violating Plaintiff's access to the courts." Pet. App. B-8. The court likewise found irrelevant that the public defender was available and refused to file the Rule 40 petition, because even if Smith had refused a public defender, "it would be incumbent on the state to provide at least a pen for an inmate who chooses to represent himself *pro se*." Pet. App. B-8. The District Court also found it irrelevant that Smith had failed to ask for waivers of the state procedural rules at issue, or that Hawaii has no clear rule akin to the doctrine of "abuse of the writ" under 28 U.S.C. § 2254 that would render preclusive in later Rule 40 proceedings the dismissal of Smith's appeal in December, 1986. In fact, the District Court found that the maximum theoretical delay of 10 weeks in the filing of the Rule 40 petition amounted to sufficient prejudice to the inmate "to withstand Defendants' motion for summary judgment on the issue of Plaintiff's access to photocopying." Pet. App. B-12. The Court rejected any claim to qualified immunity in connection with the *Bounds* issues, since "Plaintiff had a clearly established right to have a *pen* for use in drafting pleadings" (Pet. App. B-9 (citing *Bounds*, 430 U.S. at 824)), and because the law concerning other issues under *Bounds* also "was clearly established." *Id.* at B-12.[4]

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[4] As to the issue of outdoor exercise, Judge Kay held that it was "clearly established" under Ninth Circuit precedent that "regular outdoor exercise for inmates" must be provided unless "circumstances have made outdoor exercise *impossible*." *Id.* at B-15 (emphasis in original). The Court held that such exercise must even be provided for inmates such as Smith who are "constant disciplinary problem[s]," for it is "exactly this type of

7. On Petitioners' collateral order appeal from the trial court's denial of qualified immunity, the Ninth Circuit affirmed the District Court in all respects. Pet. App. A-1.

a. First, even though everything in the summary judgment record proved that Smith's second postconviction petition was frivolous, and that the District Court had expressly conceded that his denial of immunity was premised on the assumption that the Rule 40 filing was frivolous, the Ninth Circuit could "not review" whether "Smith alleged an actual injury" cognizable under *Bounds*. Pet. App. A-12 n.11. The Court did so because, in its view, the issue went to whether Smith "fail[ed] to state a claim," and not to immunity. *Id.* Construing the permissive language of *Mitchell v. Forsyth*, 472 U.S. 511 (1985), – that " 'an appellate court reviewing the denial of the defendant's claim of immunity need not . . . determine whether the plaintiff's allegations actually state a claim' " – as creating a mandatory limitation on the Court's appellate jurisdiction, the Ninth Circuit overruled our plea that *Siegert v. Gilley*, 500 U.S. 221 (1991), affirmatively mandated the Court to consider whether Smith had adduced facts to prove a constitutional violation "at all." *See* 500 U.S. at 226. The Ninth Circuit thus

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prisoner" who needs, and therefore has a clearly established right, to daily outdoor recreation. *Id.* Although Petitioners strongly disagreed with this determination and appealed the denial of qualified immunity in connection with it to the Ninth Circuit, the denial of summary judgment in connection with Smith's Eighth Amendment claim has not been made the subject of this Petition, so that the Court may properly focus on the important issues under *Bounds v. Smith* presented by this case.

refused to implement this Court's oft-stated holding that " 'baseless litigation is not [protected] by the First Amendment right to petition,' " *McDonald v. Smith*, 472 U.S. 479, 484 (1985), as well as the holding of *Bounds* itself that inmates need not be permitted to file legal papers where the "asserted claim of error was frivolous." 430 U.S. at 828 n.16 (citing *United States v. MacCollom*, 426 U.S. 317 (1976)).

b. The Court of Appeals' foregoing analysis also led it to reject Petitioners' contentions, based on the decision in *Hudson v. Robinson*, 678 F.2d 462 (3d Cir. 1982), which has been followed in at least six other circuits, *see Sands v. Lewis*, 886 F.2d 1166, 1170-71 (9th Cir. 1989) (citing cases from the 1st, 4th, 5th, 7th, 8th, and 11th circuits), that an inmate who has "submitted the document later than he would have liked but prior to the date it was due" "does not satisfy the actual injury requirement" for *Bounds* claims. *See Hudson*, 678 F.2d at 467. Because "actual injury" was deemed relevant only to damages, the Court suggested, "Smith's allegations are adequate to defeat summary judgment." Pet. App. A-12. Thus whether Smith would suffer no collateral effect from the denial of his Rule 40 petition, other than "mere delay," was deemed wholly irrelevant.

c. The Ninth Circuit also rejected Petitioners' contention that the availability of the Public Defender's office to review Smith's second Rule 40 petition effectively disposed of any contention under *Bounds*. The Court found significant "that Smith sought assistance but that the office declined to represent him," holding that, even when appointed counsel made a good faith determination that the pleading sought to be filed was

objectively frivolous, an inmate must "voluntarily and knowingly waive[ ] the assistance of counsel" for the State's efforts in providing counsel to be effective. *See* Pet. App. A-11.

d. Finally, in a cursory footnote, the Court rejected Petitioners' arguments that principles of comity and federalism required dismissal of Smith's *Bounds* claims because Smith failed to exhaust meaningful and available State court procedures that could have provided relief from the procedural rules requiring copies or signatures in black ink. Without any analysis of whether the state courts would indeed be " 'solicitous' " of claims for procedural relief under Hawaii's "all-writs" statutes, the Ninth Circuit held that the very invocation of comity concerns "seem[s] to confirm that the complete denial of a pen and photocopies made it 'very difficult or impossible' for Smith to exercise his right to court access." Pet. App. at A-11 n.9 (quoting *Johnson v. Parke*, 642 F.2d 377, 380 (10th Cir. 1981)).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit panel's decision in this case turns the First Amendment principles underlying *Bounds v. Smith*, 430 U.S. 817 (1977), inside out, and upside down, while at the same time eviscerating the "protective" doctrine of qualified immunity. *See Burns v. Reed*, 500 U.S. 478, 494-95 (1991).

The panel decision wrongly extends *Bounds*. It does so by (1) affording unprecedented constitutional status to frivolous pleadings that this Court has repeatedly held

enjoy no constitutional protection, (2) denigrating the role appointed counsel play in filtering the pleadings of those charged with and convicted of crime, and (3) ignoring the requirement of an "actual injury" for *Bounds* to be implicated at all – a requirement that every Court of Appeals to have passed on has adopted, and which every one of those courts has held does not implicate "mere delay." On top of this, the panel judgment (4) undermines principles of comity and federalism by belittling the meaningful avenues provided in the state *courts* for accommodating procedural legal needs to prison security concerns, and which themselves grant the needed "access to the courts."

Indeed, the enduring irony of this case is that the Ninth Circuit, in rejecting Petitioners' prayer for summary judgment under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny, has fundamentally undermined the "access to the courts" which *Harlow* immunity guarantees. Qualified immunity, after all, exists to ensure that "legitimate question[s]" over the scope of the Constitution are not mooted by an official's fear that provoking review of those issues will lead to personal liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985). Because of its treatment of immunity law, the Ninth Circuit's decision, permitted to stand, not only "substantially thwart[s] the development of important questions of law by freezing the first initial decision rendered on a particular legal issue." *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (unanimous Court). It freezes the the law in a way that assures that difficult legal issues will *never* be litigated.

Thus, although, under *Harlow* analysis "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all," *Siegert*, 500 U.S. at 232, and the judgment below warrants swift correction on this basis alone, an even more disturbing feature of the Ninth Circuit's decision is its disregard of the central tenet of qualified immunity – the notion that such immunity " 'provides ample protection to all but the plainly incompetent or those who knowingly violate the law.' " *Burns*, 500 U.S. at 495 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). In this sense, the judgment below flouts the notion that, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). On the basis of the Ninth Circuit's constriction of immunity doctrine alone, the Court should grant the Petition for Certiorari, and summarily reverse the judgment below. In any event, the Court should grant the Petition for Certiorari.

A. Review Should Be Granted to Correct the Ninth Circuit's Mandate that Triable Issues Remain Upon Respondent's Theory that States, under *Bounds v. Smith*, Must Affirmatively Assist State Prison Inmates in Filing Frivolous Suits.

There is no dispute, in the record, or in the panel ruling, that Terry Smith's second Rule 40 petition for

postconviction relief in state court was, in every respect, frivolous. Smith's petition was dismissed at the trial level in the state courts without a hearing, signifying that the petition was "patently frivolous and . . . without trace of support either in the record or from other evidence." *Lincoln v. State,* 66 Haw. at 567, 670 P.2d at 1263. In opposing summary judgment, Smith offered no proof to dispute Petitioners' characterization of the state court petition as frivolous. The District Court frankly assumed that the second post-conviction petition was frivolous, and expressly ruled that *Bounds v. Smith,* 430 U.S. 817 (1977), mandates state-sponsored subsidization for frivolous pleadings. *See* Pet. App. B-8. As Chief Judge Kay ruled, "[t]he issue here is not the merit of the [petition.]" *Id.* The panel below did not take issue with this characterization. *See* Pet. App. A-12.

The panel, instead, abdicated its responsibility to decide the impact of the frivolity of Smith's Rule 40 petition on his rights under *Bounds.* It did so on the belief that that issue went to " 'the merits of the plaintiff's claim,' " Pet. App. A-12, and, hence, Petitioners' frivolity arguments could not be raised "in this interlocutory appeal." *Id.* at A-12 n.11.

This reasoning defies this Court's decision in *Siegert v. Gilley,* 500 U.S. 226 (1991), and certiorari should be granted on this basis alone. *Siegert,* which involved a collateral order appeal from the denial of qualified immunity, made clear that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right

at all." 500 U.S. at 232 (emphasis added). If, on the summary judgment record, Smith had not adduced facts that, if proved, would show "a violation of a constitutional right at all," Petitioners were entitled to reversal of the District Court's denial of immunity. Instead, the Ninth Circuit refused even to open the door to consideration of the very issue *Siegert* holds *must* be decided under *Harlow*, and, allowed to stand, the Ninth Circuit's ruling will authorize abdication of the appellate function this Court held in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the courts of appeals must exercise. As *Siegert* demonstrates, in deciding a qualified immunity issue, the Court does not necessarily have to reach the merits, but, if, as here, a plaintiff has no constitutional right "at all," then summary judgment must be directed by the appellate court.

Stripped of its flawed jurisdiction-disavowing rationale, the judgment below is plainly wrong and must be reversed. This Court has made clear on numerous occasions that the "right to petition" is not "absolute," and "filing a complaint in court is a form of petitioning activity; but 'baseless litigation is not immunized by the First Amendment right to petition.' " *McDonald v. Smith*, 472 U.S. 479, 484 (1985) (quoting *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983), and citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)). Indeed, if the Constitution meant anything else, a vast array of statutory and judge-made rules for punishing frivolous pleadings would themselves be invalid. This is plainly not the case, and this Court has repeatedly not only enforced, but vigorously enforced, rules which "penalize an appellant who takes a frivolous appeal[,]" *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 7 (1987), or

otherwise advances frivolous positions in court. *See generally Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). *Bounds* itself makes clear that prisoners are "not unconstitutionally deprived of access to the courts" when they are not permitted to file legal papers "where [t]he newly asserted claim of error was frivolous." 430 U.S. at 828 n.16 (citing *United States v. MacCollom*, 426 U.S. 317 (1976)). Review is plainly warranted.

B. Review Should Be Granted to Correct the Ninth Circuit's Implicit Holding that "Mere Delay" in the Presentation of a State Court Lawsuit Can Give Rise to a Claim under *Bounds v. Smith*, a Holding that is in Direct Conflict With Rulings In at Least Seven of the Federal Courts of Appeals.

In this case, the District Court found two sorts of problems with the "access" to the courts given to inmate Smith: (1) failure to provide timely copies of the Rule 40 petition; and (2) inadequate access to a pen. In the first case, the allegedly deficient access assertedly gave rise to a delay in the filing of Smith's petition. In the second case, the allegedly inadequate "access" assertedly caused the appeal from the summary dismissal of the Rule 40 petition itself to be dismissed. Pet. App. B-7, B-12. In either case, however, Smith suffered only a "mere delay" in the prosecution of the legal claims he sought to raise in state court. There is no time limit for filing petitions under Haw. R. Penal P. 40, and there is no "abuse of the writ" doctrine in Hawaii courts that applies to dismissed petitions such as Smith's. Even viewing the record in its worst light, Smith suffered no collateral estoppel, res judicata, or equivalent burden; the only injury he could

have suffered was a "mere delay" in the presentation of his claims to the state circuit court on Oahu.

Because *Bounds v. Smith* dealt directly only with whether inmates must be provided "with law libraries or alternative sources of legal knowledge," *see* 430 U.S. at 817, the issue whether "mere delay" in obtaining a judicial ruling gives rise to constitutional concerns has remained undecided by this Court. Every Court of Appeals to have acted on the issue – until the Ninth Circuit ruled in this case – has rejected the notion that "mere delay" is enough to state a claim under *Bounds*. Beginning with *Hudson v. Robinson*, 678 F.2d 462 (3d Cir. 1982), there has developed a consistent body of precedent holding that an inmate who has "submitted the document later than he would have liked but prior to the date it was due" "does not satisfy the actual injury requirement" for claims that fall outside of the core *Bounds* mandate to provide "law libraries or alternative sources of legal knowledge." 678 F.2d at 467. *See Magee v. Waters*, 810 F.2d 451, 452 (4th Cir. 1987); *Mann v. Smith*, 796 F.2d 79, 84 & n.5 (5th Cir. 1986); *Cookish v. Cunningham*, 787 F.2d 1, 5 (1st Cir. 1986); *Hopkins v. Wallace*, 751 F.2d 1161, 1162 (11th Cir. 1985); *Grady v. Wilken*, 735 F.2d 303, 306 (8th Cir. 1984); *Jones v. Franzen*, 697 F.2d 801, 803 (7th Cir. 1983). *Cf. Sands v. Lewis*, 886 F.2d 1166, 1170-71 (9th Cir. 1989) (citing cases).

Although the Ninth Circuit purported to avoid this conflict by its jurisdiction-disavowing rationale, and reversal of that basis for the decision below would moot the need to plumb the depths of the "actual injury" requirement, it is plain that *if* the Ninth Circuit's decision means instead that "mere delay" can form the basis for a

trial on "the merits," the Ninth Circuit's decision is indeed in conflict with the prevailing view in the courts of appeals, and certiorari should issue for that reason. In any case, the Petition for Certiorari should be granted.

C. Review Should be Granted to Correct the Ninth Circuit's Unprecedented Denigration of the Role of Appointed Counsel in Filtering Frivolous from Nonfrivolous Suits.

Although *Bounds*, at its root, makes clear that States meet the Constitution's obligations by providing either for "libraries or other forms of legal assistance," 430 U.S. at 825, the Ninth Circuit left the District Court's denial of summary judgment intact even though the State of Hawaii had made available to Smith the most effective form of "legal assistance" of all, namely, a public defender, competently trained in the law, and who, for all the record discloses, competently reviewed the Rule 40 petition, and found that it had no merit whatsoever.

The District Court and the Ninth Circuit found that *Bounds* was not only violated, but was "clearly" violated whenever the State fails to provide "paper and pen," even when the State provides a competent attorney. Because the Public Defender refused to find that there was any plausible merit in Smith's Rule 40 petition, and for that reason, "declined to represent [Smith,]" the Ninth Circuit held that Smith was entitled to proceed pro se, and was therefore entitled to have a "pen."

The Ninth Circuit's decision, which allows an inmate to veto the decision of a competent counsel, not only

fundamentally expands *Bounds* beyond its original limits, but is at odds with this Court's clear holding in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), that States may act at their discretion in granting counsel in state postconviction proceedings. *Finley* rejects the view that "a 'right to counsel' can have only one meaning, no matter what the source of that right," *id.* at 556, and confirms that the State's provision of counsel in this case was adequate. The decision of the Public Defender that Smith's Rule 40 petition was frivolous was reviewed and confirmed by a state judge; all Smith even allegedly lost was his ability to have that finding reviewed on appeal. Under *Finley* Smith had no right to federal legal assistance to prosecute that appeal, and under *Bounds* the provision of a competent attorney to evaluate the case at the outset was sufficient to meet any remaining constitutional concern, whether or not Smith was given "paper and pen."

For this added reason, certiorari should be granted.

D. Review Should Be Granted to Correct the Ninth Circuit's Broad Denigration of the Role of the State Judiciary in Providing Access to the Courts Notwithstanding Procedural Rules and their Impact on Inmates Whose Activities Are Subjected to Close Regulation Due to Security Concerns.

Perhaps the most disturbing feature of all of the Ninth Circuit's decision is its naked "denigrations of the procedural protections afforded by [Hawaii] law." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 15 (1987). For if this Court's jurisprudence makes anything clear, it is that "[i]t denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the

land." *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 240 n.2 (1985).

In this case, the Ninth Circuit cursorily held that it was " 'difficult or impossible' for Smith to exercise his right to court access," Pet. App. A-11 n.9, when Smith never presented to *any* state judge a request of any kind, let alone a specific one, to exempt him from the requirements of filing multiple copies or that documents be signed in black ink. Challenges to the adequacy of state law "hardly come from [Smith] with good grace, as [he] apparently made no effort under [Hawaii] law to secure the relief sought in this case." *Pennzoil,* 481 U.S. at 15.

Hawaii's remedies to the problems caused by the prison's legitimate security concerns over the use of pens were at all times clear and available. Hawaii's "all-writs" statutes gave both the trial court and the Supreme Court of Hawaii broad power "[t]o make or issue any order or writ necessary or appropriate in aid of [their] appellate or original jurisdiction," and to "do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before [them]." *See* Haw. Rev. Stat. §§ 602-5, 603-21.9, *supra.* The Ninth Circuit never disputed that the "ban on the use of pens was necessary to fulfill legitimate penological interests," Pet. App. A-10 n.8; *see Turner v. Safley,* 482 U.S. 78 (1987), and the obvious safety valve in this case was the authority of the state courts to grant relief from the procedural rules that allegedly gave rise to the blockage on "access to the courts." Instead of turning to that safety valve, the Ninth Circuit described the situation as "futile" when "a meaningful application has not yet been made." *Cf. MacDonald, Sommer & Frates v. Yolo County,* 477 U.S.

340, 353 n.8 (1986) (on the requirement of administrative ripeness). Indeed, if " '[a]llowing criminal defendants to deprive the state courts of [the] opportunity' to reconsider previously rejected constitutional claims is fundamentally at odds with the principles of comity," *Smith v. Murray*, 477 U.S. 527, 535 (1986), the Ninth Circuit's total disregard of the ability of the state courts to hear claims in the first instance despite an otherwise applicable procedural rule is plainly wrong.

The violence done by the Ninth Circuit's decision to the values of comity and federalism is palpable and severe. This Court should grant review to restore respect for those values.

E. Review Should Be Granted to Correct the Ninth Circuit's Undue Constriction of the Protections of *Harlow* Immunity.

Even if all the foregoing were incorrect, the essence of *Harlow* immunity is that "officials performing discretionary functions are not subject to suit when [federal] questions are resolved against them only after they have acted," and "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell v. Forsyth*, 472 U.S. at 535. The scope of the protection afforded by qualified immunity is not to be judged by reference to "abstract rights," *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), and this is especially so where the constitutional rights at stake "have been expressed in terms of 'unreasonable' " government conduct. *Id.* at 643. These admonitions are fully applicable here, where *Bounds*, at most, requires the provision of "adequate" access to the courts. *See* 430 U.S. at 828 ("adequate law libraries or adequate

assistance from persons trained in the law"). The "decisive fact is not that [a defendant's] position turned out to be incorrect, but that the question was open at the time he acted." *Mitchell*, 472 U.S. at 535. The foregoing analysis shows that, at a minimum, the "merits" of Smith's claim under *Bounds* present issues that are "open" under any view of that term. This truth ought to compel granting the writ, if not outright summary reversal.

Even if it is true that prison officials might have violated Smith's *Bounds'* rights, the need to consider the "legitimate penological interests" in avoiding the use of pens to perpetrate stabbings, gang violence, and trafficking in contraband is real and substantial. The Ninth Circuit never took issue with this fact, but somehow concluded that the balancing undertaken in this case was insufficient to counsel summary judgment. In *Hunter v. Bryant*, 112 S. Ct. 534 (1991), this Court summarily reversed a similar refusal by the Ninth Circuit to make "accommodation for reasonable error" by those charged with maintaining public safety. *See id.* at 537. Whatever were Petitioners' obligations under the First Amendment in their particulars, Petitioners were also obligated under the Eighth Amendment to " 'take reasonable measures to guarantee the safety of the inmates.' " *Farmer v. Brennan*, 114 S. Ct. 1970, 1976 (1994). Here, where the duty of protection is affirmatively commanded by the Constitution itself, the Ninth Circuit's notion that the First Amendment was so clearly implicated to put Petitioners to the significant burdens of discovery and trial warrants correction no less than in *Hunter*.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted and the opinion of the Court of Appeals refusing to grant summary judgment upon Respondent Smith's claims pursuant to *Bounds v. Smith* should be summarily reversed with instructions to enter judgment for Petitioners on those claims, or, in the alternative, the Court should grant the Petition for Certiorari and set the case down for plenary argument. Because the Court of Appeals has not issued its mandate, and may still be considering the merits of the case, *see* n.1, *supra*, the Court may wish to hold this Petition pending the issuance of mandate.

Dated: Honolulu, Hawaii, February 13, 1995.

Respectfully submitted,

MARGERY S. BRONSTER
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
First Deputy Attorney General
State of Hawaii
**Counsel of Record*

Department of the
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1292

Counsel for Petitioners
Ted Sakai, Administrator,
Halawa Correctional Facility,
in his Official and
Individual Capacities, et al.

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN ALLEN; TERRY SMITH, *Plaintiffs-Appellees,* v. TED SAKAI; HAROLD FALK; JOHN CABRAL; CLAYTON FRANK; ADELE FUJITA; LEONARD GONSALVES; LEIANN KAIMIKAUA; GARY KAPLAN; GERALD MENDIOLA; CINDA SANDIN; FRANCIS SEQUIERA; LAURENCE SHOHET; WILLIAM OKU; MALCOLM LEE; TERRENCE ALLEN; and RAY SUENAGA, in their official and individual capacities, *Defendants-Appellants.*	No. 93-16780 D.C. No. CV-86-00577-ACK OPINION

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, Chief District Judge, Presiding

Argued and Submitted
October 3, 1994 – Pasadena, California

Filed November 15, 1994

Before: Betty B. Fletcher, and Ferdinand F. Fernandez, Circuit Judges, and John W. Sedwick,* District Judge.

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* Hon. John W. Sedwi k, United States District Judge for the District of Alaska, sitting by designation.

Opinion by Judge Fletcher

OPINION

FLETCHER, Circuit Judge:

Hawaii state prison officials, defendants in a 42 U.S.C. § 1983 suit, appeal the denial of summary judgment on their claim of qualified immunity. We affirm.

I

Terry Smith was transferred to the Special Holding Unit ("SHU")[1] of the Halawa High Security Facility ("HHSF")[2] after multiple disciplinary offenses ranging from counterfeiting documents to assault. Smith and others, proceeding *pro se*, filed a federal civil suit against

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[1] Inmates at HHSF were subdivided into four categories or "phases," each with its own housing area in the facility. All new inmates were assigned to Phase I and resided in SHU, where they encountered the harshest conditions of confinement found at HHSF. With good behavior, inmates could advance to other phases and correspondingly more tolerable housing conditions. Smith was a Phase I inmate during the entire period covered by this lawsuit.

[2] On or about September 1991, the State of Hawaii converted HHSF into its special needs facility. It is no longer a maximum security facility, and Smith no longer resides there. Therefore, Smith's claims are for damages only.

various prison officials under 42 U.S.C. § 1983.[3] Defendants moved for summary judgment on the grounds that they enjoyed qualified immunity and that the plaintiffs had failed to state a claim for which relief could be granted. The magistrate recommended that the defendant's motion be granted on all of Smith's claims except his claims that defendants deprived him of sufficient outdoor recreation, the use of a pen, and access to photocopies. The district court issued a written order modifying the magistrate's findings but adopting his recommendation to deny defendant's motion for summary judgment as to Smith's remaining three claims. Defendants filed a timely appeal of the district court's order.

II

Smith alleges that, for a six-week period during his longer confinement at SHU, the defendants violated his right to freedom from cruel and unusual punishment by providing him only 45 minutes per week of outdoor exercise. He also alleges that the defendants violated his right to access to the courts by depriving him of the use of a pen and photocopying services. The sole issue on appeal is whether the defendants were entitled as state officials at the summary judgment stage to dismissal on

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[3] The original complaint alleged thirteen causes of action, and several new issues were raised in subsequent petitions for preliminary relief. During the lengthy course of this litigation, most of Smith's co-plaintiffs dropped out and several claims were dismissed. The only claims remaining on appeal concern alleged deprivations of Smith's constitutional rights.

the ground of qualified immunity. Although a denial of summary judgment generally is not a "final order" over which this court has jurisdiction, 28 U.S.C. § 1291, a denial of qualified immunity may be reviewed under the collateral order doctrine. *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985); *see generally Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949). We review de novo. *Act Up!/ Portland v. Bagley,* 988 F.2d 868, 871 (9th Cir. 1993).

Defendants are entitled to qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Although a plaintiff must do more than offer conclusory allegations that the defendant violated a clearly established constitutional right, a public official is not entitled to qualified immunity when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

III

Smith alleges that the defendants violated his right to freedom from cruel and unusual punishment by depriving him of adequate outdoor exercise. Phase I inmates were confined to their cells almost twenty-four hours per day. Although prison officials assert HHSF had a goal of providing Phase I inmates with five hours of access per week to the facility's outdoor recreation area, they admit

that during a six-week period Smith was permitted outside of his cell for outdoor recreation only 45 minutes per week.

Before the period in question, several circuits, including this one, had held that deprivation of outdoor exercise could constitute cruel and unusual punishment. *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979); *Davenport v. DeRoberts*, 844 F.2d 1310, 1314-15 (7th Cir.), *cert. denied*, 488 U.S. 908 (1988); *Ruiz v. Estelle*, 679 F.2d 1115, 1151-52, *vacated in part as moot*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Campbell v. Cauthron*, 623 F.2d 503, 507 (8th Cir. 1980). This court recognized in *Spain* that "some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates." *Spain*, 600 F.2d at 199. We emphasized that the plaintiffs were in long-term incarceration where they were in continuous segregation, generally spending twenty-four hours each day alone in their cells. *Id.* Under those conditions, deprivation of outdoor exercise constituted cruel and unusual punishment. *Id.; see also Toussaint v. Yockey*, 722 F.2d 1490, 1493 (9th Cir. 1984) (denial of outdoor exercise to inmates assigned to administrative segregation for over one year raised "substantial constitutional question").

Defendants' analogy to *LeMaire v. Maass*, 12 F.3d 1444, 1458 (9th Cir. 1993), is flawed. In *LeMaire* we found no constitutional violation from a termination of the plaintiff's exercise privileges "for considerable periods of time" after he attacked two correctional officers with a weapon as he left the yard, then vowed to attack them again. Although Smith was placed in SHU at HHSF

because of disciplinary infractions,[4] unlike the plaintiff in *LeMaire*, Smith did not lose his exercise privileges based on a determination by prison officials that he presented a "grave security risk when outside his cell" and that measures were necessary to deter violent behavior separating Smith from the rest of the population in SHU. *See LeMaire*, 12 F.3d at 1458.

Here, the defendants acknowledge that they have a goal of providing five hours exercise per week and do not suggest that Smith poses particular problems in the exercise yard. Their only excuse is that logistical problems made it difficult to provide adequate exercise. According to the defendants, scheduling an inmate's time in the exercise yard was difficult because, for security reasons, inmates had to be accompanied to the recreation yard by a guard and only one inmate could use the recreation yard at a time. We recognize that the practical difficulties that arise in administering a prison facility from time to time might justify an occasional and brief deprivation of an inmate's opportunity to exercise outside. However, we cannot accept the defendants' excuses as justifying, as a matter of law at the summary judgment stage, the deprivation that took place here. *Cf. LeMaire*, 12 F.3d at 1458 (upholding denial of outdoor exercise to inmate representing "grave security risk"); *Hayward v. Procunier*, 629 F.2d 599, 603 (9th Cir. 1980) (upholding temporary deprivation of outdoor exercise during "lockdown" initiated

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[4] We note that each of the plaintiffs in *Spain* had been charged with or convicted of violent acts in prison, including shared responsibility in an incident that resulted in the murder of three prison officers and two inmates. *Spain*, 600 F.2d at 192.

during a "genuine emergency"), *cert. denied*, 451 U.S. 937 (1981).

Smith's incarceration in SHU was indefinite and therefore potentially long-term, and under admittedly "harsh" conditions. After *Spain* and *Toussaint*, it should have been apparent to defendants that they were required to provide regular outdoor exercise to Smith unless "inclement weather, unusual circumstances, or disciplinary needs made that impossible."[5] *Spain*, 600 F.2d at 199. We affirm the district court's denial of defendants' motion for summary judgment on Smith's Eighth Amendment claim.

IV

Defendants also maintain that they are entitled to summary judgment on the ground of qualified immunity on Smith's claims that they violated his right of access to the courts under *Bounds v. Smith*, 430 U.S. 817 (1977). Smith claims that prison officials denied him access by

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[5] Defendants also argue that *Spain* is inapplicable to cases involving neither a complete nor long-term denial of outdoor exercise. They note that the plaintiffs in *Spain* had been deprived completely of outdoor exercise for four years and as a matter of prison policy, whereas Smith's claim is that, for six weeks, he was permitted out of his cell only weekly. Although the length and severity of the alleged illegal conduct may be critical questions at trial, they are not dispositive at the summary judgment stage.

refusing to photocopy his court papers despite his willingness to pay and by providing only a pencil, rather than a pen.[6]

Both of Smith's right of access claims arise from his difficulties in filing papers in the state court in connection with his second attempt to obtain post-conviction relief. Smith's first petition for post-conviction relief had been denied. Proceeding *pro se,* Smith attempted to file a second petition for post-conviction relief. The court returned the petition because Smith did not submit two additional copies. Smith claims that this failure was due to the defendants' refusal to make photocopies for him at a later time. Smith was able to refile the petition pursuant to Hawaii Rules of Penal Procedure, Rule 40, which provides that a petition for post-conviction relief may be filed at any time after judgment. The state trial court ultimately dismissed the petition as meritless.

Smith attempted to appeal the dismissal. However, because his notice of appeal was completed in pencil rather than in "black ink" as required by Rule 3 of the

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[6] To the extent that Smith's claims rested on allegations that prison officials denied him *free* photocopies, the magistrate recommended that the defendants' motion for summary judgment be granted on this claim. In respect to the pen claim, during some of the time Smith was housed in SHU, the facility had a policy forbidding the use of pens by inmates except from 8:00 a.m. to 4:00 p.m. on weekdays. The magistrate determined that forty hours per week of pen use was sufficient to fulfill Smith's right of access to the courts and recommended that the district court grant the defendants' motion for summary judgment to the extent that Smith's claims rested on this policy. Smith did not object to these recommendations and does not appeal the district court's order adopting them.

Circuit Court Rules, the court returned it to Smith for correction. Smith did not refile the notice of appeal until the time period of doing so had expired, and the Hawaii Supreme Court ultimately dismissed the appeal because of Smith's failure to file a timely notice of appeal. Smith claims that HHSF's ban on pens caused his failure to use black ink on his first timely presented notice of appeal.

A

At the time defendants allegedly deprived Smith of the use of a pen and access to photocopying, the Supreme Court had clearly established an inmate's right of access to the courts, including a right to services and supplies indispensable to filing court documents. *See Bounds*, 430 U.S. 817; *Wolff v. McDonnell*, 418 U.S. 539 (1974). Although this court had not yet held that "some means of accurate duplication" is an essential component of an inmate's right of access to the courts, *see Gluth v. Kangas*, 951 F.2d 1504, 1508-10 (9th Cir. 1991), other circuits had. *See, e.g., Jones v. Franzen*, 697 F.2d 801 (7th Cir. 1983) (inmate states valid claim against prison officials if he shows that prison's photocopy policy impeded court access); *Johnson v. Parke*, 642 F.2d 377, 380 (10th Cir. 1981) (denial of photocopies unconstitutional to extent it actually infringed inmate's right of access to courts).[7]

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[7] In the absence of preexisting binding precedent within this circuit, this court "look[s] at all available decisional law including decisions . . . of other circuits" to determine whether a plaintiff has shown that the illegality of a defendant's conduct should have been apparent when it occurred. *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989).

Moreover, it does not require sophisticated "legal scholarship" to know that a plaintiff's access to the courts could be hindered seriously by an inability to make multiple, accurate copies of legal documents. *See Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986) (public officials not charged with "the kind of legal scholarship normally associated with law professors and academicians," but with the knowledge of a reasonable person), *cert. denied*, 483 U.S. 1020 (1987).

Similarly, the defendants should have known that they had a duty to provide Smith with a pen for preparing court documents. The Supreme Court had recognized prison officials' "indisputable" duty to provide inmates access to "paper and pen to draft legal documents." *Bounds*, 430 U.S. at 824. Although the defendants emphasize that their ban on the use of pens was necessary to fulfill legitimate penological interests,[8] *Bounds* makes clear that an inmate's right of access to the courts is "fundamental" and places upon prison officials an "affirmative obligation[ ] to assure all prisoners meaningful access to the courts." 430 U.S. at 828, 824. Although the state may "choose among the avenues of access," the avenue it chooses must "satisfy its constitutional obligation" under *Bounds*. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981).

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[8] They maintain that inmates have used pens as weapons, to conceal contraband, and to tattoo themselves. Pencils, on the other hand, cannot be used to tattoo or to conceal contraband, and guards can reduce their effectiveness as weapons by controlling their length.

Hawaii's Circuit Court Rule 3(a) requires that all "handwritten entries on papers shall be in black ink," and defendants concede that this mandate was "clear and explicit" and provided no exceptions. In light of the clarity of the preexisting law, it should have been apparent to the defendants that a ban on the use of pens would seriously hamper an inmate's access to the courts and therefore constitute a violation of his rights under *Bounds*.[9]

Apparently, defendants initially thought Smith had refused the assistance of the Public Defender's office. However, they essentially concede on appeal that Smith sought assistance but that the office declined to represent him. Thus any reliance defendants seek to place on *Storseth*, which held that a prisoner had not been denied access if he had rejected counsel, is misplaced. Absent evidence that Smith voluntarily and knowingly waived the assistance of counsel, the defendants are not excused

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[9] Defendants argue that pens and photocopies were not necessary for Smith to have meaningful access to the courts, despite the fact that both the "black ink" and multiple copies requirements were explicit and provided no clear exceptions. Defendants would require Smith to move the trial court to exempt him from the requirement or seek a writ of mandamus from the Hawaii Supreme Court ordering the Court Documents Supervisor to file his notice of appeal. They argue that the state courts should be expected to be "solicitous of inmate litigation" and therefore willing to exempt an inmate from procedural rules that are difficult to meet in light of prison regulation. These arguments, however, seem to confirm that the complete denial of a pen and photocopies made it "very difficult or impossible" for Smith to exercise his right to court access. *See Johnson v. Parke*, 642 F.2d 377, 380 (10th Cir. 1981).

from providing Smith the tools required to have meaningful access to the courts as a *pro se* litigant.

B

Defendants also urge that to defeat their motion for summary judgment on the ground of qualified immunity, Smith must allege that the denial of photocopying services and the use of a pen actually prejudiced his right of access to the courts. *See Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989) (plaintiff asserting "non-core" violation of *Bounds* must allege "actual injury" to court access).[10]

We disagree. The Supreme Court recognized in *Mitchell* that "qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct" so "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." 472 U.S. at 527-28. The Court stated explicitly that "an appellate court reviewing the denial of the defendant's claim of immunity need not . . . determine whether the plaintiff's allegations actually state a claim." *Id.* at 528.[11]

We agree with the district court that Smith's allegations are adequate to defeat summary judgment; he has

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[10] They also argue that to establish injury Smith must show that his second petition for post-conviction relief and his appeal of its dismissal had merit.

[11] The district court in fact determined that Smith alleged an actual injury under *Sands* and therefore denied the defendants' motion to dismiss for failure to state a claim; however, we do not review that determination in this interlocutory appeal.

alleged conduct on the part of defendants that, if true, violates clearly established constitutional rights, defeating defendants' claims to qualified immunity at the summary judgment stage. Whether Smith ultimately establishes his claims of actual injury and damages is another matter.[12]

V

Smith has alleged facts which, if true, would establish that the defendants violated clearly established law defining Smith's right to outdoor exercise and his right to access the courts. The district court's denial of defendants' motion for summary judgment is affirmed.

AFFIRMED.

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[12] This case, of course, differs from *Act Up!/Portland*, 988 F.2d at 871-74, where the questions before the court involved the defendant's conduct and a reasonable officer's belief about the conduct. Here the ultimate result of the conduct is in dispute – *viz.* what injury, if any, did the conduct lead to.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

JOHN ALLEN, et al., Plaintiffs, vs. TED SAKAI, et al., Defendants	CIV. NO. 86-00577 ACK

ORDER ADOPTING IN PART AND REJECTING IN PART MAGISTRATE'S FINDING AND RECOMMENDATION FILED APRIL 6, 1993

(Filed Jul. 30, 1993)

I. INTRODUCTION

Plaintiffs *pro se* Terry Smith aka Sabil Mujahid (Plaintiff) and John Allen, inmates at Halawa Correctional Facility (HCF), filed the instant civil rights Complaint pursuant to 42 U.S.C. § 1983. The inmates have sued multiple parties and seek declaratory, injunctive and monetary relief, alleging that the various Defendants violated their rights as secured by the federal constitution.

The original complaint in this action was filed on August 20, 1986. Since that time, there have been scores of motions, days of hearings, extensive reports and recommendations, and a number of substantive and procedural orders. There are over 430 documents filed and numerous expanding files in this case.

On November 14, 1992, Defendants moved for summary judgment. Both Allen and Smith responded by filing cross-motions for summary judgment. On April 6, 1993, the Magistrate filed a findings and recommendation relating to Plaintiff Smith. On April 19, 1993, Defendants filed objections to the Magistrate's findings and recommendations. Although Defendants have not objected to the majority of the Magistrate's findings and recommendation, they have filed objections to three discrete portions of the Recommendation. Defendants attribute error to the Magistrate's denial of qualified immunity on the following claims alleged in Plaintiff's Complaint: (1) whether Smith's right to access to the courts was violated by not allowing him the use of a pen on certain occasions; (2) whether Smith's right to access to courts was violated by not allowing him to copy legal documents; (3) whether Smith's right to be free from cruel and unusual punishment was violated by not always allowing him one hour of outside recreation, five days a week.

On May 6, 1993, Plaintiff Smith was granted an enlargement of time, until May 21, 1993, in which to object to the Magistrate's Findings and Recommendation. On May 27, 1993, Plaintiff sought a second enlargement of time in which to file his objections. This was denied by this Court on June 3, 1993. However, on May 27, 1993, Plaintiff filed a list of objections to the Magistrate's Findings and Recommendation he had compiled to date. This Court now considers those objections.

Among Plaintiff's many grievances and perceptions that the Magistrate's Findings and Recommendation imply inaccurate characterizations of events in the

lengthy record of this case, Plaintiff makes several objections supported by law which merit discussion. Plaintiff objects to the following findings of the Magistrate: (1) that Plaintiff was not unconstitutionally denied access to religious counselors while in Phase I and Disciplinary Segregation; (2) that Plaintiff was not unconstitutionally denied religious literature; (3) that Defendants are entitled to qualified immunity on the issue of restricting Plaintiff's receipt of religious literature; (4) that Plaintiff's claims based on Defendants' "paging" system or mutual inmate legal assistance are moot because Defendants have now provided a law library for high security inmates; (5) that Defendants are entitled to qualified immunity on the issue of restricting Plaintiff's access to legal materials and mutual inmate legal assistance; and (6) that Defendants did not violate Plaintiff's right of access to the courts by providing allegedly inadequate amounts of paper.

The Court will not reiterate a summary of all the factual allegations appearing in Plaintiff's Complaint; the Magistrate has more than adequately done so in his Recommendation. The Court will, of course, discuss the facts necessary to resolve each of the Defendants' specific objections.

II. DISCUSSION

A. Standard for Summary Judgment

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). One of the principal purposes of the summary

judgment procedure is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2553 (1986). Summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to his case where that party will bear the burden of proof of that essential element at trial. *Id.* at 322, 106 S.Ct. at 2552.

> If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment.

T.W. Electrical Serv. v. Pacific Elec. Contractors Assoc., 809 F.2d 626, 630 (9th Cir. 1987) (citations omitted). Instead, Rule 56(e) requires that the nonmoving party set forth, by affidavit or as otherwise provided in Rule 56, " '*specific facts* showing that there is a genuine issue for trial.' " *Id.* (quoting Fed.R.Civ.P. 56(e)) (emphasis in original). At least some " 'significant probative evidence tending to support the complaint' " must be produced. *Id.* (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593 (1968)). Legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790 (1979).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Ins. Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987) (citing, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986)). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

The Ninth Circuit has established that "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006, 108 S.Ct. 698 (1988). Moreover, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986) (footnote omitted). Indeed, "if the factual context makes the nonmoving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d at 1468 (emphasis in original) (citing, *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.) Of course, all evidence and inferences to be drawn therefrom must be construed in the light most favorable to the nonmoving party. *T.W. Elec. Services*, 809 F.2d at 630-31.

B. Standard for Qualified Immunity

Government officials who perform discretionary functions are protected from liability for civil damages when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). In order for a right to be "clearly established," "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 107 S. Ct. 3034, 3039 (1987). Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 106 S. Ct. 1092, 1096 (1986). The plaintiff "bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct." *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991).

C. Access to Courts – Use of Pen

Defendants first assert that the Magistrate erred by refusing to grant qualified immunity on the issue of whether Plaintiff was denied access to the courts by Defendants failure to provide Plaintiff with a pen.

The United States Supreme Court has required that inmates be provided with a pen to draft legal documents. *See Bounds v. Smith*, 430 U.S. 817, 824 (1977) (stating that "[i]t is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents with notarial services to authenticate them,

and with stamps to mail them."). Courts may adopt reasonable regulations regarding postage and writing materials, however. *See King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987). At Halawa, for instance, inmates in Disciplinary Segregation and Phase I were only permitted to use pens on Monday through Friday from 8:00 a.m. until 4:00 p.m. when there were more guards on duty.

In this case, however, Plaintiff has claimed that he was denied use of a pen altogether prior to October 5, 1987. Plaintiff claims that because he did not have a pen with which to draft his pleadings, his state court petition for post-conviction relief was denied. The Magistrate refused to grant summary judgment on this issue and denied qualified immunity because the right of an inmate to use a pen was clearly established at the time in question.

Defendants first argue that they are entitled to qualified immunity and summary judgment because case law gives the state the choice of providing either a law library or persons trained in the law. Objections at 3 (citing *Bounds*). In the instant case, Plaintiff was offered the assistance of a Public Defender, which he declined. Defendants argue that Plaintiff was not denied access to the courts because he could have used an attorney.

Defendants correctly assert that the states may choose from a variety of methods for providing meaningful access to the courts. "When an adequate method of access is provided and an inmate does not avail himself of it, he may not insist on an avenue of his choosing." *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). The implication is that if, for instance, the state provides

an attorney to represent an inmate, a law library need not be provided. *Id.* However, the *Storseth* court held that if an inmate declines an offer of appointed counsel, his only option is to proceed *pro se. Id.*

So even though the state would not have been obligated to provide Smith with a law library in this case (because it offered a public defender), it would be incumbent on the state to provide at least a pen for an inmate who chooses to represent himself *pro se.* By declining appointed counsel, an inmate may be choosing to forego access to a source of legal information and knowledge, but if he is left with the option of proceeding on his own, he still requires at least a pen, paper, and postage in order to file the requisite legal documents. Thus, while Defendants' argument does have a modicum of merit, it ultimately falls short.

Defendant next argues that because the circuit court and public defender had already deemed Plaintiff's petition to be frivolous, Plaintiff was not harmed by the refusal of the appellate court to accept his pencil written pleading. This argument is specious. The issue here is not the merit of the appeal, but whether Defendants' actions resulted in violating Plaintiff's access to the courts. The Court must merely determine whether Plaintiff has alleged an actual injury to court access. *Sands v. Lewis,* 886 F.2d 1166, 1171 (9th Cir. 1989). "An 'actual injury' consists of some specific ' "instances in which an inmate was actually denied access to the courts." ' " *Id.*

In the case at bar, Plaintiff adequately makes such an allegation. Plaintiff was not provided with a pen, as required under *Bounds,* and as a result his appeal was

rejected. This suffices to demonstrate actual injury, as defined by *Sands,* for purposes of summary judgment and qualified immunity. The Magistrate correctly rejected this argument.

Finally, Defendants weakly argue that there was no clearly established rule that the state circuit court would not accept pencil written documents. Defendants argue that because they did not have notice that the court required pen written documents, they could not have known they were violating Plaintiff's right of access. Defendants misconstrue the issue. Plaintiff had a clearly established right to have a *pen* for use in drafting pleadings. *See Bounds,* 430 U.S. at 824. Defendants violated that clearly established right by refusing to allow him use of the pen. As a result of that refusal, Plaintiff was injured by the court's refusal to accept his pleadings. Plaintiff has sufficiently alleged a violation of a clearly established right.

Therefore, this Court will adopt the Magistrate's findings and recommendation that Defendants are not entitled to qualified immunity on the pen issue. Accordingly, this Court adopts the Magistrate's findings and recommendation that both Plaintiff's and Defendants' motions for summary judgment be denied.

D. Copying

Defendants next maintain that the Magistrate should have granted qualified immunity on the issue of photocopying. Plaintiff averred that he was denied the

opportunity to make photocopies of legal documents and that, as a result, he was denied access to the courts.

Defendants first argue that there is no clearly established right to make copies at the time that Plaintiff was denied such access. The Magistrate's recommendation relies on *Gluth v. Kangas*, 951 F.2d 1504, 1511 (9th Cir. 1991) (stating that litigation requires some means of duplication), to hold that Plaintiff has a right to have copies made, as necessary, to gain access to the courts. However, as defendant points out, *Gluth* was decided a number of years after the instant complaint was filed. The issue in the case at bar concerns the rights, if any, of Plaintiff to photocopy at the time he was denied such right.

Defendants argue that *Gluth*, if applicable, is non-dispositive because it establishes the right *after* the instant complaint was filed. However, Defendants overlook the fact that other circuits have interpreted *Bounds* as requiring access to photocopies since as early as 1981. *See, e.g., Johnson v. Parke*, 642 F.2d 377, 380 (10th Cir. 1981) (holding that "[i]f the rule does limit all inmates to one copy only of their legal documents, and more than one copy must be filed with the court, then it unconstitutionally restricts an inmate's right of access to the courts to the degree that it makes it very difficult or impossible for an inmate to satisfy the filing requirements of the federal courts. . . . Allowing inmates to pay for and receive photocopies of the legal materials required by the courts is part of the "meaningful access" to the courts that inmates are constitutionally entitled to.") (citing *Bounds*, 430 U.S. at 823).

However, in *Johnson v. Moore*, 948 F.2d 517, 521 (9th Cir. 1991), the Ninth Circuit affirmed a grant of summary judgment against an inmate who alleged, in part, that he was denied access to courts when he was given free paper and carbon paper and no free photocopying. The court held that the plaintiff could not establish actual injury despite the fact that the plaintiff claimed that lack of photocopying led to the dismissal of an appeal. Specifically, the court stated:

> [H]e did not substantiate that claim. Neither did he demonstrate how the lack of photocopying affected his timing, nor why carbon copying was inadequate, nor that the denial of photocopying in that instance was attributable to the defendant.

948 F.2d at 521.

In the instant case, Plaintiff merely alleges that denial of an opportunity to have documents copied made it more difficult to have Defendants served. Smith Aff., Sept. 10, 1989, ¶ 622 at 79. However this does not establish any injury because Plaintiff was not ultimately denied access to the courts. His complaint was ultimately served on Defendants and the case has proceeded. *Id.* This does not establish actual injury.

To the extent that Plaintiff may argue that his state court appeal was denied due to lack of photocopies, it contradicts his claim that the appeal was denied because he used pencil rather than pen. Plaintiff's Exhibit 3909 (attached to Defendants' Objections) is a letter which states that the Notice of Appeal was returned to Plaintiff because it was not written in pen. There is no mention that the failure to provide copies was the reason for the

rejection, although extra copies were requested if the Notice was resubmitted.

However, Plaintiff's exhibit 3911, a May 2, 1986 letter to Plaintiff from the First Circuit Court, indicates that his petition for post-conviction relief was returned because Plaintiff failed to submit two copies in addition to the original pleading. This evidence alone is sufficient to withstand Defendants' motion for summary judgment on the issue of Plaintiff's access to photocopying.

On a final point, Plaintiff's Exhibit 89 indicates that Defendants temporarily misplaced original legal papers belonging to the Plaintiff, but that Plaintiff was in possession of copies while the originals were missing, and further that the originals were later found and returned to Plaintiff. Plaintiff does not specifically allege injury due to this incident, and further, the Court does not find any injury to have occurred therefrom.

In summary, Plaintiff's allegation that his petition for post-conviction relief was denied because he was unable to file the required number of copies raises a genuine issue of material fact concerning Plaintiff's access to photocopying. Accordingly, the Court will deny summary judgment for Defendants on this issue. Furthermore, the Court will deny qualified immunity to the Defendants on the photocopying issue, due to the fact that the law in this area was clearly established at the time that the acts constituting denial of access to photocopying allegedly occurred.

E. Outdoor Exercise

The Magistrate also declined to grant qualified immunity on the issue of outdoor exercise. Plaintiff has asserted that he regularly received only 45 minutes per week of outdoor exercise.

Prisoners have a distinct constitutional right to outdoor exercise. *Spain v. Procunier,* 600 F.2d 189, 199 (9th Cir. 1979). In *Spain,* the Ninth Circuit affirmed the district court's order finding that "the denial of fresh air and regular outdoor exercise and recreation constitutes cruel and unusual punishment" and ordering prison officials to provide inmates with outdoor exercise of one hour per day, five days a week "unless inclement weather, unusual circumstances or disciplinary needs ma[ke] that *impossible." Id.* (emphasis supplied).

The *Spain* Court emphasized the significance of outdoor recreation for inmates when it stated, "some form of regular outdoor exercise is *extremely important* to the psychological and physical well being of the inmates." *Id.* (emphasis supplied). Recent Ninth Circuit cases reaffirm the principle enunciated in *Spain. E.g., McKinney v. Anderson,* 924 F.2d 1500, 1507 (9th Cir. 1991) ("In *Spain,* we held that denying prisoners fresh air and opportunities for regular outdoor exercise violates the Eighth Amendment.")

While *Spain* did recognize that penological considerations may justify some restrictions on outdoor exercise, such circumstances are limited. *Spain* limited such considerations to "unusual circumstances" or "disciplinary needs" that make outdoor exercise "*impossible." Spain,* 600

F.2d at 199; *accord Mitchell v. Rice*, 954 F.2d 187, 192 (4th Cir. 1992) (The one court to specifically address justifications for exercise restrictions limited them to 'unusual circumstances' or circumstances where 'disciplinary needs made [outdoor exercise] *impossible.*' " (quoting *Spain;* emphasis by the *Mitchell* Court)). Indeed, in *Spain*, the Court explicitly rejected the state's argument that restrictions on outdoor exercise were justified to protect prison staff and inmates from violent attacks, to insure against escape, and to minimize costs or inconvenience to the prison. *Spain*, 600 F.2d at 200. The Court reasoned that "[t]hese concerns justify not permitting plaintiffs to mingle with the general prison population but do not explain why other arrangements [for outdoor exercise] were not made." *Id.*

In this case, it is undisputed that Plaintiff did not receive the required amount of outdoor activity. Exhibits attached to Plaintiff's motion and to Defendants' objections clearly indicate that over a six week period in 1988, Plaintiff received outdoor exercise on only six days. See Pl.'s Exh. 5442 attached to Def.s' Objections. Defendants have attempted to justify this clear diversion from the *Spain* standard by asserting that weather and other unusual circumstances made outdoor recreation impossible. Defendants, however, have pointed to no specific day during the aforementioned six week period when inclement weather prevented recreation.

The primary justification given for the deviation from the *Spain* standard was that a new recreation schedule was being developed for prisoners in Disciplinary Segregation and Phase I. Defendants have not provided a tenable argument for why a schedule revision should

take six weeks. The Ninth Circuit has recognized the extreme importance of regular outdoor exercise for inmates. This mandate is not to be taken lightly. Deviations from *Spain* will be acceptable only when circumstances have made outdoor exercise *impossible*. Schedule changes, even if accepted as a one-time justification for denial of exercise, do not suffice to warrant a six week retreat from the *Spain* standard.

No more persuasive is Defendants' request that this Court take into account that Plaintiff is a constant disciplinary problem and, for this reason, is not entitled to more than the bare minimum of outdoor exercise. It is exactly this type of prisoner to which the *Spain* decision was directed. While this Court is certainly cognizant of the difficulty in arranging outdoor recreation for the types of prisoners who are regularly confined in Disciplinary Segregation and Phase I, this Court is not permitted to accede to a retreat from the *Spain* standard short of conditions which make grants of outdoor exercise impossible. There is no evidence that the situation at HCF at the time of this complaint arose to that level.

Accordingly, this Court will adopt the Magistrate's findings and recommendation on the issue of outdoor recreation.

F. Religious Counseling

Despite the fact that both the parties, in their respective motions and cross-motions for summary judgment, and the Magistrate have addressed the issue of religious counseling, the issue is not now properly before this Court. Plaintiff, in an August 3, 1988 pleading, moved "to

stipulate a withdrawal of the issue about religious counseling." This motion was acknowledged in an August 24, 1988 report and recommendation, in which the Magistrate found Plaintiff had withdrawn his request for a preliminary injunction on the issue of access to a religious counselor.

It does not appear to the Court that Plaintiff has subsequently amended his complaint to include any claim based on access to religious counseling. Therefore, based on Plaintiff's withdrawal of the issue from this case, the Court will not address the issue of access to religious counseling. Furthermore, the Court vacates the Magistrate's April 6, 1993 findings and recommendation on the issue.

G. Religious Literature

Plaintiff's objections center primarily on the Magistrate's finding that Defendants are entitled to qualified immunity for restricting Plaintiff's access to religious materials. Plaintiff has alleged that denying him access to the *Muslim Journal* and other Muslim literature is unconstitutional. Plaintiff has attempted to receive religious material from both his family and his religious counselor, neither of whom have been allowed to send such literature to Plaintiff.

The Magistrate found Plaintiff's factual allegations to be incomplete, as the literary materials he had attempted to receive did not comply with the "publisher only" rule, which only allows an inmate to receive publications sent from the publisher or a bookstore. *See Bell v. Wolfish*, 441 U.S. 520, 548-49 (1979); *Pratt v. Sumner*, 807 F.2d 817, 818

(9th Cir. 1987); *Johnson v. Moore*, 948 F.2d 517, 520 (9th Cir. 1991). Consequently, the Magistrate found there was no constitutional violation of Plaintiff's First Amendment right to religious materials and further that Defendants were entitled to qualified immunity because no clearly established right had been violated. *Findings and Recommendation* at 17.

At a minimum, the "publisher only" rule applies to receipt of materials which are bound, or otherwise characterized as being "hard-cover" books. *Johnson*, 948 F.2d at 520. This is due to the security problems presented by allowing inmates to receive books from outside sources, in particular the smuggling of items in the binding. *Id.; see also Bell*, 441 U.S. at 549 (discussing examples of items able to be smuggled in book bindings and the administrative and staff resource problems associated with searching every such item sent to an inmate).

The Magistrate relied on *Bell* to find that the same penological interests of institutional security present there are also present here, in part because contraband has been found among Plaintiff's possessions in the past. *Findings and Recommendation* at 17. However, the Plaintiff challenges the Defendant's practice of denying him access to softcover materials. As stated in *Pratt*, "the policy of [Defendants] applies to softcover materials as well as hardcover books; [Plaintiff] thus challenges a policy clearly not considered or addressed in [*Bell*]." *Pratt*, 807 F.2d at 819.

The court in *Pratt* did not rule on the merits of that particular plaintiff's claim, rather, the court determined

that since neither the Supreme Court nor the Ninth Circuit had addressed the constitutionality of completely banning an inmates receipt of both softcover and hardcover books, from other than publishers or bookstores, the plaintiff's complaint was not frivolous.

Again in *Johnson*, the most recent case to discuss the "publisher only" rule, the court failed to further define the parameters of the rule itself. *Johnson*, 948 F.2d at 520. Instead, the court reiterated past case law. "Although *Pratt* suggests that a softcover book "publisher only" rule should be scrutinized closely, it does not clearly establish the right to receive such materials from other sources. Because we cannot say 'that in light of pre-existing law the unlawfulness' of denying access to softcover books from other parties is 'apparent', defendants are entitled to prevail on their defense of qualified immunity." *Id.*; (*citing Anderson*, 483 U.S. at 640 (discussing standard for qualified immunity)).

Due to the continuing imprecision of the "publisher only" rule, it is clear that Defendants in the present case are entitled to qualified immunity on the issue of restricting Plaintiff's access to religious materials.

Therefore, this Court will adopt the Magistrate's finding and recommendation that Defendants' are entitled to qualified immunity. Accordingly, this Court adopts the Magistrate's finding and recommendation to grant Defendants' motion for summary judgment and to deny Plaintiff's cross-motion for summary judgment on the issue of denying Plaintiff access to religious materials.

H. "Paging" System/ Law Library/ Mutual Legal Assistance

Plaintiff next objects to the Magistrate's failure to address the constitutionality of Defendants' former "paging" system for allowing segregated inmates access to legal text and Defendants' prohibition of legal assistance between inmates. The Magistrate found that Plaintiff's claims relating to these issues had become moot because Defendants installed a law library for inmate use subsequent to the filing of Plaintiff's complaint. Despite the fact that the subsequent provision of a law library satisfied the constitutional right of access to the courts, *see Bounds v. Smith,* 430 U.S. 817, 828 (1977), "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (void-for-vagueness challenge to city ordinance not rendered moot by repeal of the offensive language therein). Voluntary cessation is a recognized exception to the mootness doctrine. *See U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also,* Erwin Chemerinsky, Federal Jurisdiction § 2.5.4 at 118-19 (1989). Therefore, Plaintiff is apparently arguing that despite the fact that Defendants have voluntarily ended restrictions on access to legal materials, this Court still has jurisdiction over Defendants' former actions.

The Magistrate found that the Defendants had themselves rendered the "paging" system issue moot by unilaterally abandoning the practice of restricting inmate access to law library materials. Consequently, relying on

Ninth Circuit precedent for the proposition that mutual inmate legal assistance is not required where inmates have access to an adequate law library, the Magistrate found that the installation of such a library had rendered this issue moot. *See Storseth v. Spellman*, 654 F.2d 1349 (9th Cir. 1981).

The Magistrate's recommendation cites *County of Los Angeles v. Davis*, 440 U.S. 625 (1979) to support the finding of mootness. There, it was stated that if "(1) it can be said with assurance that 'there is no reasonable expectation . . . ' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation", jurisdiction may abate because the case becomes moot. *Id.* at 631, *quoting, W.T. Grant Co.*, 345 U.S. at 632.

Here, Phase I and Disciplinary Segregation, in which Plaintiff was held during the alleged violations, no longer exist as correctional units. The "paging" system at Halawa was only used by Defendants in the areas which no longer exist. Defendants have now installed a law library in the high security areas of Halawa for use by inmates. Furthermore, Plaintiff is currently housed in the medium security area, where a law library has always been provided to inmates. This is sufficient evidence to assure that there is no reasonable expectation that the "paging" system will be resurrected by Defendants.

On the issue of denying Plaintiff access to the legal assistance of other inmates, the establishment of a law library by Defendants sufficiently demonstrates that a reasonable alternative to such assistance exists, and, therefore, Defendants' regulation may validly be

enforced. *See Johnson v. Avery,* 393 U.S. 483, 490 (1969) (inmate assistance in preparation of petitions for post-conviction relief may only be barred where reasonable alternatives exist); *see also, Storseth v. Spellman,* 654 F.2d 1349, 1353 (9th Cir. 1981) (when meaningful alternatives are provided for inmates, such as an adequate law library or legal services plan, the state may bar inmate writ writers entirely). Accordingly, this Court finds Plaintiff's claims relating to Defendants' "paging" system and the denial of mutual inmate legal assistance to be moot.

Moreover, while Plaintiff correctly cites *Bounds* for the proposition that "providing prisoners with adequate law libraries or adequate assistance from persons trained in the law" is a fundamental constitutional requirement, *Bounds,* 430 U.S. at 828, Plaintiff has repeatedly been offered counsel in this and other cases, and he has declined all assistance from persons trained in the law. "This situation is analogous to a defendant's rejection of an offer of appointed counsel for appeal when appointment is discretionary. That defendant cannot then claim that the state infringed on his constitutional right of access by not providing him with another method of access, such as a law library." *Storseth v. Spellman,* 654 F.2d 1349, 1353 (9th Cir. 1981) (inmate unsuccessfully attempted to retain fellow inmate for legal assistance where court found there was adequate access to either a law library or appointed counsel). Additionally, "[w]hen an adequate method of access is provided and an inmate does not avail himself of it, he may not insist on an avenue of his choosing." *Id.*

Although refusing appointment of counsel, as Plaintiff here has done, forces an inmate to proceed pro se, this

is neither the fault nor the responsibility of prison officials. In the instant case, this means that Defendants' attempts to assist Plaintiff while he was in disciplinary segregation by providing photocopies of legal text, albeit with limitations attached, through the "paging" system, did not amount to a clear violation of the right to access established in *Bounds.* Defendants were not obligated to provide any such benefits once Plaintiff refused to accept appointed counsel.

Accordingly, the Court adopts the Magistrate's recommendation to grant Defendants' motion for summary judgment and to deny Plaintiff's cross-motion for summary judgment.

I. Inadequate Amounts of Paper

Plaintiff objects to the Magistrate's findings that inmates may properly be limited to four pages of writing paper a day and that inmates may further be required to return their writing paper on a one-for-one basis in order to receive more paper. Plaintiff alleges such restrictions are an unconstitutional hindrance to his right of access to the courts. To ensure that he has adequate access to the courts, Plaintiff seeks issuance of a permanent injunction against Defendants, requiring one tablet of paper to be provided upon request, with costs deducted from Plaintiff's prison account.

Defendants' policy limits inmates to four sheets of paper per day, with the possibility of receiving two additional sheets per day based on an individual showing of need. The Magistrate found Defendants' policy had not denied Plaintiff access to the courts because Plaintiff has

been able to bring multiple suits and file numerous pleadings and documents. However, the Magistrate found that Defendants' policy was unnecessarily inflexible, and recommended enjoining the strict limitations placed on the amounts of paper inmates were allowed to possess. The Magistrate further recommended that Defendants be allowed to set a limit on how many additional sheets of writing paper an inmate may be given at any one time. Apparently, the Magistrate found that although Plaintiff was not denied access to the court in this matter, due to Plaintiff's prolific ability to generate pleadings, Defendants' policy was capable of denying future inmate litigators adequate access to the courts.

This Court agrees with the Magistrate's finding that Defendants' limitation of paper did not deny Plaintiff's right of access to the courts. However, the Court does not agree with the Magistrate's recommendation that Defendants' policy of limiting paper should be more flexible, while still allowing Defendants to set a limit on the number of sheets. This is due to the fact that no guidelines were suggested by the Magistrate which would allow Defendants to comply with a vague recommendation to change their policy.

Defendants' restrictions on the type and amount of items allowed in Phase I and Disciplinary Segregation cells serve strong penological interests connected with the safety of the correctional facility, including that of prison employees and other inmates. Although more flexibility may be desirable, the policy does not violate Plaintiff's rights. As for Plaintiff's suggestion, a permanent injunction requiring Defendants to provide Plaintiff with

tablets of paper on request unduly interferes with the legitimate discretion invested in prison officials.

Finally, Plaintiff has not alleged that he was denied access to the courts due to inadequate provision of paper on any specific occasion. Therefore, Plaintiff's objections fail to raise a claim upon which relief may be granted, and Defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

Therefore, this Court adopts the Magistrate's findings and recommendation that Plaintiff was not denied access to the courts due to the provision of allegedly inadequate amounts of paper, and holds that Defendants are entitled to summary judgment on this issue as a matter of law.

J. Inmate Liberty Interest in Place of Confinement.

Plaintiff makes numerous allegations concerning due process violations, apparently in the belief that placement in Phase I implicates a liberty interest. The Magistrate found that Plaintiff had no protected liberty interest in his placement in Phase I and that no due process issues were raised. Accordingly, the Magistrate recommended granting Defendant's motion for summary judgment on this issue.

As an initial clarification, the Magistrate's use of the term "sanctions" refers to Plaintiff's placement in Phase I, not Disciplinary Segregation or any type of discipline. April 6, 1993 Findings and Recommendation at 40. This is apparent from a review of Plaintiff's due process violation allegations. Docket 417, Smith Aff., September 10,

1989, ¶ 9 at 2; ¶ 39 at 5; ¶ 111 at 16; ¶ 114 at 17; ¶ 199 at 27; ¶ 657, 659 at 85.

As the Magistrate correctly found, cases involving claims of state law liberty interests turn upon an analysis of state statutes and rules in order to determine whether they contain "explicitly mandatory language in connection with requiring specific substantive predicates" for state action. *Hewitt v. Helms*, 459 U.S. 460, 472 (1983). "A state may create a constitutionally protected liberty interest by establishing regulatory measures that impose substantive limitations on the exercise of official discretion." *Baumann v. Arizona Dept. of Corrections*, 754 F.2d 841, 844 (9th Cir. 1985) (*citing Hewitt*, 459 U.S. at 470-71). Additionally, "[t]o establish a protected interest, a prisoner must show 'that particularized standards or criteria guide the state's decision makers.' " *Id.* (*citing Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)).

Both the Supreme Court of Hawaii and the United States Supreme Court have reviewed Hawaii statutes and regulations and found that neither placement in a particular facility, nor in a portion thereof, implicate a liberty interest. *Lono v. Arivoshi*, 621 P.2d 976, 980-81 (Haw. 1981); *Olim*, 461 U.S. at 251. Furthermore, the United States Supreme Court has repeatedly ruled, "both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests." *Hewitt*, 459 U.S. at 467.

The Court in *Hewitt* went on to reiterate that "to hold . . . any substantial deprivation imposed by prison authorities triggers the procedural protections of the Due

Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Id.* (*citing Meachum v. Fano*, 427 U.S. 215, 225 (1976)). Furthermore, "[a]s long as the conditions or degree of confinement to which a prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montanve v. Haymes*, 427 U.S. 236, 242 (1976).

In the state of Hawaii, therefore, the wide discretion traditionally accorded by the courts to prison authorities in the placement of inmates within prison facilities is limited only by the minimum constitutional requirements. Furthermore, "[i]t is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence." *Hewitt v. Helms*, 459 U.S. 460, 468 (1983).

Here, Plaintiff was being transferred to Phase I from Disciplinary Segregation. Phase I was not disciplinary confinement. *See* Plaintiff's Exhibit 602. Rather, Phase I was a stage for "phasing" inmates back into the general prison population after being released from Disciplinary Segregation. Of the two, only placement in Disciplinary Segregation implicates due process protections.

In the instant case, Plaintiff does not claim that he was denied due process when Disciplinary Segregation was imposed. Rather, Plaintiff claims his right to due process was violated by his numerous transfers to Phase I

from Disciplinary Segregation without notice, hearings, or access to information allegedly relied upon by prison officials to place Plaintiff in Phase I. Smith Aff., September 10, 1989, ¶ 111 at 16; ¶ 657, 659 at 85; ¶ 762 at 109. However, as correctly summarized by the Magistrate:

> The regulations applicable to Plaintiff's confinement at HHSF are contained in Title 17, Hawaii Administrative Rules. In addition, HHSF promulgated other policies and procedures and inmate guidelines which were not published in the Hawaii Administrative Rules, all of which are on record in this case. None of these regulations created any expectation of advancement through the phases, nor were there any "particularized standards of criteria [to] guide the state's decision makers" when determining whether to advance or retain an inmate at a particular phase. The determination was wholly in the discretion of social workers and counselors who monitored the inmate and made an educated guess as to whether he could function under a less restrictive regimen. Clearly, no liberty interest was created by these rules.

Accordingly, Plaintiff has not shown that he possessed a protectible liberty interest in his placement as Phase I, and therefore Plaintiff has failed to demonstrate that any right to due process has been violated. This Court thus finds there is no genuine issue of material fact concerning Plaintiff's allegations of due process violations, and accordingly grants summary judgment for Defendants on this issue.

III. CONCLUSION

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Local Rule 404-2, the Court hereby adopts (except as otherwise noted) those portions of the Magistrate's April 6, 1993 findings and recommendation to which no party has objected. Additionally, this Court, having read the memoranda of the parties, adopts in part and rejects in part the portions of the Magistrate's April 6, 1993 findings and recommendations to which the parties have objected. Finally, the Magistrate's findings and recommendation concerning access to religious counseling is hereby vacated. IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 30 1993.

/s/ Alan C. Kay
Chief United States
District Judge

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JOHN ALLEN, et al. Plaintiffs, vs. TED SAKAI, et al. Defendants.	CIVIL NO. 86-00577 ACK/FIY FINDINGS AND RECOMMENDATION

FINDINGS AND RECOMMENDATION

(Filed Apr. 6, 1993)

This is an action by two inmates, Terry Smith aka Sabil Mujahid ("Smith") and John Allen ("Allen"), claiming various constitutional deprivations based on Defendants' operation of Halawa High Security Facility ("HHSF"). This action is brought under 42 U.S.C. § 1983. On November 14, 1992, Defendants moved for summary judgment. On January 17, 1992, Smith filed a cross-motion for summary judgment.

Procedural History

The original complaint in this action was filed on August 20, 1986. Since then, there have been scores of motions, days of hearings, extensive reports and recommendations, and a number of substantive and procedural orders. There are over 430 documents filed in 11 files and numerous expanding files in this case.

The original complaint was filed by multiple plaintiffs. Over the nearly seven years since the suit commenced most of the plaintiffs have dropped out of this action. At this time, only Smith and Allen are plaintiffs in this case. Both have several overlapping claims remaining. However, Smith and Allen have responded separately to Defendants' motion for summary judgment. Accordingly, this Court will address the claims of each plaintiff separately. This findings and recommendation will only address the claims of Smith.

On January 17, 1992, Smith ("Plaintiff") filed a cross-motion for summary judgment. Although numerous claims have been alleged during the course of this case, Plaintiff's cross-motion addresses only five specific categories of issues. This Court finds that Plaintiff has waived all other claims not raised. *See Plaintiff's Status Conference Statement*, Docket 427; Plaintiff's Testimony at Hearing on Motion for Summary Judgment, November 20, 1992. Accordingly, the following is a list of issues which Plaintiff alleges are still pending in this case:

Access to the Courts

pens
paper
postage
envelopes
photocopies of legal papers
amount of cell retained property
law library paging system and direct access to
law library or legal assistance

Phasing Program

notice
hearings
opportunity to be heard
reasons relied upon
reviews
placement

Religious Literature

muslim newspaper
muslim materials in the mail

Religious Counseling

denial of religious counseling when in Phase I
and Disciplinary Segregation

Recreation

amount of outdoor exercise while in Phase I
and Disciplinary Segregation

Plaintiff alleges that Defendants have violated his First, Sixth, Eighth and Fourteenth Amendment rights.

Specifically, Plaintiff claims that his First Amendment rights have been abridged because he was denied religious materials and he could not receive religious counseling while in Phase I and Disciplinary Segregation.

Plaintiff's Sixth Amendment claims relate to access to the courts. Plaintiff claims that he did not have sufficient access to pens, paper, envelopes, free postage, cell retained legal property, was prevented from photocopying, receiving free photocopying, and was denied physical access to a law library.

Plaintiff claims that his Eighth Amendment rights have been violated because he was denied sufficient outdoor exercise while in Phase I and Disciplinary Segregation.

Plaintiff's Fourteenth Amendment claims stem from the denial of due process in the implementation of the phasing program.

On November 20, 1992, a hearing was held by this Court to address Defendants' motion and Plaintiff's cross-motion for summary judgment. This court took the extraordinary action of holding a hearing on this matter because the age of this matter and its complexity compelled this Court to take this step rather than attempting to coax Plaintiff to provide affidavits which addressed the issues herein. This Court had Plaintiff sworn in and allowed Plaintiff to present whatever evidence he wished on these motions. This Court did not allow cross-examination of Plaintiff and indicated that it would treat Plaintiff's sworn testimony as if it were an affidavit filed in opposition to Defendants' motion and in support of Plaintiff's cross-motion.

State of the Pleadings

The state of the pleadings in this case is a procedural nightmare.

The original complaint was filed on August 20, 1986. It was not served until February of 1987. When it was finally served, it was served twice on Defendant Sakai, and once on Defendants Shohet and Oku. An answer was filed on March 12, 1987.

On August 18, 1987, Allen filed a "motion to expand the record," which the Court treated as a motion for leave to file a supplemental complaint and granted on August 18, 1987. This complaint added new claims but no new defendants. No supplemental complaint was actually filed or served.

Plaintiff filed an amended complaint on September 3, 1987 without leave of Court. This complaint only added damage claims. Defendants filed another answer on September 9, 1987.

On January 21, 1988, Plaintiff moved for leave to supplement the complaint and attached a supplementary complaint thereto. On March 3, 1988, Plaintiff moved to strike his supplemental complaint.

On March 11, 1988, Defendants Sakai, and Oku were once again served. It is unclear what they were served with. An answer was filed on March 28, 1988. The next day, the Court granted leave to file the amended complaint but denied Plaintiff's motion of January 21, 1988.

On April 7, 1988, Plaintiff filed a "Motion for Leave to Supplement an Amendment Complaint" and attached an "Amendment Complaint" thereto. He also filed a "Motion to Amend Complaint for Damage Relief" with an amended complaint attached thereto. These complaints added Defendants Falk, Cabral, Frank, Fujita, Gonsalves, Kaimikaua, Kaplan, Mendiola, Sandin, and Sequiera, in both their official and individual capacities. On May 24, 1988, the Court granted a motion to amend complaint.

Plaintiff then served the unfiled April 7, 1988, complaints on Defendants Falk, Cabral, Frank, Fujita, Gonsalves, Kaimikaua, Kaplan, Mendiola, Sandin, and Sequiera. No summons was ever issued for them, but the U.S. Marshal delivered copies of complaints for each Defendant on July 25, 1988 to Frances DeLima, a secretary working in the office of the Director of the Department of Corrections (Mr. Falk's copy was delivered to his personal secretary, Marilyn Inouye). Process returns were filed on August 2, 1988.

On April 28, 1988, Allen filed a motion for leave to amend complaint. This motion was granted on May 24, 1988. This amended complaint added Defendants Sandin, Kaplan, Cabral, Fujita, Gonsalves, Lee, Allen, Suenaga, Sequiera, and Frank, but was never filed.

On November 22, 1988, Plaintiff wrote to the Attorney General's office demanding "that you should answer my amend [sic] complaints filed May 26, 1988 in 88-00060 ACK and 86-0577 ACK." The Attorney General's office replied on December 5, 1988, stating:

> My records reflect that you have never perfected service of any of these amended complaints upon the 16 or so individual Defendants. As for your original complaint (as well as your first one or two amendments) Defendants have answered by filing a Motion for Summary Judgment.

Letter, Thomas D. Farrell to Plaintiff, dated December 5, 1988, Docket 292. However, on December 15, 1988, all named Defendants filed a sweeping "Answer to All Outstanding Complaints".

On January 31, 1989 and March 8, 1989, Plaintiff filed two "Motion for Leave to Supplement an Amended Complaint". Plaintiff also attached an amended complaint to each motion. Plaintiff later withdrew the March 8, 1989 motion orally. It is unclear what became of the January 31, 1989, motion.

On October 6, 1989, all named Defendants filed an answer to an "Amended Complaint".

From this Court's reading of the various complaint-like documents, only the original complaint was properly filed and served upon Defendants. The reason for this is because Fed. R. Civ. P. 15 contemplates that an amended complaint is to be filed (except in enumerated instances) *after* leave of court is given. The Rules of the United States District Court for the District of Hawaii ("Local Rules"), Rule 120-3 also seems to indicate that the attached amended complaints are only exhibits from which this Court will determine whether or not to grant a motion to amend a complaint. Further, another district court has stated that an amendment of a complaint is not effective until it is *filed* with the court. *Donner v. Sulcus Computer Corp.*, 103 F.R.D. 548, 549 (N.D. Ga. 1984). Therefore, when leave of Court was granted to amend the complaint, Plaintiff was required to file an amended complaint with the Court.

Local Rule 120-3 also states that, "Any party filing or moving to file an amended pleading shall reproduce the entire pleading as amended and may not incorporate any part of a prior pleading by reference, except with leave of court." The complaint-like documents were not entire complaints stating all claims against all Defendants.

Therefore, they failed to satisfy Local Rule 120-3. The Local Rule is supported by case law which states that, "[a]ll causes of action not alleged in an amended complaint are waived." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1981) citing *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981)). If this Court were to address only the issues raised in Plaintiff's last complaint-like document, some of Plaintiff's claims would not be addressed.

Further, pursuant to Fed. R. Civ. P. 4(a), the court's mechanism for service of process cannot be implemented until a complaint is filed. Summonses were never issued for any of the complaint-like documents. Therefore, any service of the complaint-like documents was not properly executed.

Plaintiff was given the opportunity to clearly set out his claims on February 16, 1990, when the Court ordered Plaintiff to set forth anew all claims which he wished to litigate in an omnibus pleading. *Order Setting Forth Guidelines, Docket 380.* Plaintiff's omnibus pleading did not set forth anew any of his substantive claims, but rather, sought rulings on procedural motions. *Plaintiff's Omnibus Pleading Pursuant to Magistrate's Order Filed February 16, 1990,* Docket 382.

Forcing Plaintiff who is proceeding pro se to follow this Court's rules may seem harsh but it has been held in this circuit that "Pro se litigants must follow the same rules of procedure that govern other litigants." *King*, 814 F.2d at 567 (citing *United States v. Merrill*, 746 F.2d 458, 465 (9th Cir. 1984), *cert. denied*, 469 U.S. 1165 (1985)).

Accordingly, a number of questions have been raised as to whether the complaints and complaint-like documents were properly filed and served upon Defendants. However, Defendants have not argued that any of the claims now raised by Plaintiff should not be addressed by this Court. Therefore, because of the state of the pleadings, to ensure that *all* possible claims are adjudicated once and for all, this findings and recommendation will proceed on the assumption that all documents were properly filed and served.[1]

The Prison

Plaintiff's claims center around the phasing program at HHSF as it existed prior to 1986. Today, HHSF no longer exists. On or about September 1991, HHSF was converted to use as the state's special needs facility. Accordingly, this Court will discuss HHSF *as it existed when Plaintiff's claims arose.*

At the time of the alleged constitutional violations, HHSF was the State's only maximum security prison housing approximately 5 percent of the total inmate population of the state. *Declaration of Cinda Sandin,* attached as Exhibit "A" to Defendants Motion for Summary Judgment filed November 14, 1991 ("Docket 411"), ¶ 3 at 3. These 120 or so inmates were the most assaultive, escape-prone, manipulative and dangerous inmates in the entire correctional system. *Id.*

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[1] This Court, however, will distinguish claims raised in the original complaint from those raised in subsequent documents.

All of the inmates at this facility were classified as maximum security inmates. Within the high security facility there were subclassifications of inmates corresponding to housing areas known as "modules." Docket 411, ¶ 4 at 4. There were four housing areas at the High Security Facility and thus, there were four classifications known as "phases". *Id.* Inmates in each phase were segregated from those in other phases. This program was formally called the "Segregated Module Control Program" or "SMCP." Inmates and staff also referred to it as "the phasing program." All inmates entering HHSF were initially assigned to Phase I. *Id.*

Phase I inmates were held in solitary confinement in what was known as the "Special Holding Unit." *Id.* This unit was also used for high security inmates who were serving disciplinary sentences for violations of prison regulations. *Id.* Inmates in Phase I at the High Security Facility encountered what were undeniably the most harsh conditions of confinement in Hawaii's correctional system. *Id.* It was purposefully designed that way, and to provide no more than constitutional minima. *Id.* No educational or vocational programming was allowed, no radios or televisions were present. *Id.* Correspondence and literature were extremely limited. *Id.* No group activities were allowed. *Id.* Inmates were not expected to spent [sic] a great deal of time in Phase I. *Id.* Typically, inmates spend 30 days or less in that phase. *Id.* Unless they committed violations of facility regulations, they progressed to Phase II. *Id.*

Inmates who committed institutional misconduct had these violations documented in misconduct reports known unofficially as "write-ups." Docket 411, ¶ 7 at 5-6.

Inmates who received a significant number of write-ups, or who were written up for serious misconduct such as assaults, were sentenced to a period of disciplinary confinement, not to exceed 60 days. *Id.* Disciplinary sentences were also served in the Special Holding Unit. *Id.* The inmate was afforded notice of the misconduct charge and a due process hearing. *Id.* After completing his sentence in disciplinary confinement, the inmate would begin the program again at Phase I. *Id.*

The decision to move an inmate to a higher phase was entirely discretionary, and there was no fixed timetable for movement. Docket 411, ¶ 8 at 6. Inmates could and did spend more or less than 120 days in a particular phase. *Id.* Inmates at Phase I were automatically reviewed for advancement to Phase II on a 30 day schedule. *Id.*

Summary Judgment Standard

Summary judgment shall be granted where "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). Summary judgment must be granted against a party who fails to show facts to establish an element essential to his case and on which he will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). All evidence submitted by moving and non-moving parties and inferences to be drawn therefrom must be construed in the light most favorable to the non-moving party. *T.W. Electrical Services v. Pacific and Electrical Contractors Ass'n.*, 809 F.2d 626, 630-632 (9th Cir. 1987).

Rule 56(e) requires that the non-moving party set forth, by affidavit or as otherwise provided in Rule 56, " '*specific facts* showing that there is a genuine issue for

trial.' " *Id.* (quoting Fed. R. Civ. P. 56(e)) (emphasis in original). At least some " 'significant probative evidence tending to support the complaint' " must be produced. *Id.* (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)).

The Ninth Circuit has established that "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988). Moreover, "[w]hen the non-moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (footnote omitted). Indeed, "if the factual context makes the non-moving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d at 1468 (emphasis in original) (citing, *Matsushita*, 475 U.S. at 587).

Immunity Standards

Under the Eleventh Amendment, a state is immune from suit brought in federal court by her own citizens or citizens of other states. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Federal court actions against agencies or instrumentalities of a state also are barred by the Eleventh Amendment. *Shaw v. State of Cal. Dept. of Alcoholic Beverage Control*, 788 F.2d 600, 603 (9th

Cir. 1986). Furthermore, a suit against state officials, in their official capacity, is no different than a suit against the state itself and therefore is subject to the Eleventh Amendment. *See Kentucky v. Graham*, 473 U.S. 159, 165-167 (1985). "[N]either a state nor its officials acting in their official capacity are 'persons' under § 1983." *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304, 2311-12 (1989). Thus, unless the state unequivocally waives sovereign immunity or congress exercises its power under the Fourteenth Amendment to override the immunity, the state, its agencies, and its officials – acting in their official capacity – are immune from suit under the Eleventh Amendment. *See Will*, 109 S.Ct. at 2309; *Pennhurst*, 465 U.S. at 104.

Here, since the State of Hawaii has not waived its Eleventh Amendment immunity, and Plaintiff has not asserted a cause of action based on any federal law which overrides the state's immunity, this suit is barred by the Eleventh Amendment immunity to the extent that Plaintiff's complaint states a cause of action against Defendants in their official capacity.

State officials sued in their individual capacity are protected by qualified immunity insofar as their conduct was undertaken in good faith. Good faith has been determined to mean that an action does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity extends to prison officials. *Procunier v. Navarette*, 434 U.S. 555 (1987). The issue of

whether qualified immunity is available should be determined by motion before trial. *See Act Up!/Portland v. Bagley,* No. 90-35888 (9th Cir. July 24, 1992). The plaintiff "bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct." *Romero v. Kitsap County,* 931 F.2d 624, 627 (9th Cir. 1991).

This Court discusses the applicability of qualified immunity *infra.*

Offensive Collateral Estoppel

Plaintiff argues that offensive collateral estoppel requires that this Court rule in his favor. In support, Plaintiff cites to preliminary injunctions issued in *Sims v. Falk,* Civil No. 88-0348 DAE (D. Haw. January 4, 1989), *Smith v. Sandin,* Civil No. 88-0060 ACK (D. Haw. July 14, 1988), and this case.

The purpose of a preliminary injunction is to preserve the relative position of the parties until a trial on the merits can be held. *University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981). A preliminary injunction is not a preliminary adjudication on the merits, but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment. *Sierra On-Line, Inc. v. Phoenix software, Inc.,* 739 F.2d 1415, 1422 (9th Cir. 1984). In this case, no adjudication on the merits has been made, and therefore, offensive collateral estappel does not require this Court to make the same ruling it did when preliminary injunctive relief was granted.

First Amendment – Religious Literature

Claims

In his original complaint, Plaintiff claims that he was denied access to the *Muslim Journal*, Docket 2, ¶ 19 at 4, and that Defendants did not provide or allow access to religious publications. Docket 2, ¶ 37 at 7. Plaintiff also asserts that Defendants discriminated against specific religious materials. Docket 2, ¶ 26 at 5.

In his affidavit accompanying his cross-motion for summary judgment, Plaintiff makes additional factual allegations. *Affidavit of Terry Smith*, attached as Exhibit "D-2" to Plaintiff's Cross-Motion for Summary Judgment filed January 23, 1992 ("Docket 417"). Plaintiff continues to complain that he was denied a Muslim newspaper while he [sic] in Phase I, Disciplinary Segregation, or Module A.[2] Docket 417, ¶ 670 at 91. Further, he complains that he could not receive this Muslim newspaper from his religious counselor or through the mail unless he complied with the "publisher only" rule. Docket 417, ¶ 404 at 51; ¶ 741 at 106; ¶ 802 at 116; ¶ 813 at 122. Plaintiff claims that having the *Muslim Journal* is necessary for him to effectively exercise his Black Muslim religious beliefs, and to follow the teachings of Imam Wallace D. Mohammad. Docket 417, ¶ 401 at 51; ¶ 407 at 52.

Plaintiff also complains that he was denied religious materials. Plaintiff claims that, generally, Phase I inmates were denied religious materials from outside. Docket 417,

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[2] The denial of a Muslim newspaper while in Module A occurred only in 1986.

¶ 51 at 7. Plaintiff claims that he could not receive religious literature, that he was denied religious materials in the mail, and that he could not receive pamphlets. Docket 417, ¶ 575 at 71; ¶ 816 at 122; ¶ 24 at 3. Plaintiff also claims that he was denied a Muslim newsletter, *Criteria*, when it was sent in the mail or hand delivered by Saeed Rasool, his religious counselor. Docket 417, ¶ 730 at 104.

Plaintiff was Not Denied His Right to Religious Materials

Plaintiff claims that he was unconstitutionally denied religious materials through the mail. Plaintiff's claim is meritless.

Plaintiff's factual allegations are incomplete. Based on exhibits submitted by Plaintiff, the only religious materials he has been denied are those which do not comply with the "publisher only" rule.[3] *See, e.g.*, Exhibits 785, 5331.

The publisher only rule states "[a]n inmate may receive hardcover publications, paperback books, magazines and newspapers only from the publisher, a book club or from a bookstore." Requests for subscriptions must be submitted to a Case or Unit Manager. Rule 4.0.14(a)(1). Inmates may be limited to a specific number of subscriptions. Rule 4.0.14(a)(2).

A similar rule to the one in question was upheld as constitutional in *Bell v. Wolfish*, 441 U.S. 520, 550 (1979). There, the Supreme Court acknowledged that the rule

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[3] Administrative Rules, Halawa Correctional Facility: Chapter 15, Communication, Mail and Visiting, 4.0.14(a).

was a "rational response by prison officials to an obvious security problem." *Id.* The rule was found to be a reaction to the ongoing problem of smuggling contraband into the prison. Further, the rule was a content neutral one.

This Court finds that the same penological interests present in *Bell* are applicable here. Contraband has been discovered among Plaintiff's possessions in the past. Docket 411, ¶ 15 at 9. In addition, Defendants' rule is a content neutral one.

Defendants are Entitled to Qualified Immunity

Additionally, Defendants are entitled to qualified immunity on this issue. Defendants' rule is perfectly compatible with constitutional requirements. Defendants in no way violated any clearly established statutory or constitutional rights.

Accordingly, it is RECOMMENDED that Defendants' motion for summary judgment be GRANTED on this issue. It is also RECOMMENDED that Plaintiff's cross-motion for summary judgment be DENIED on this issue.

First Amendment – Religious Counseling Claim

In his affidavit accompanying the cross-motion for summary judgment, Plaintiff makes an additional First Amendment claim. Plaintiff claims that he was denied the right to meet to with his religious counselor while in Disciplinary Segregation and Phase I. Docket 417, ¶ 24 at 3; ¶¶ 52, 53 at 7; ¶ 403 at 51; ¶ 405 at 52; ¶¶ 565-572 at 70; ¶¶ 575, 577 at 71. Defendants have admitted that inmates

were denied access to religious counselors when in Disciplinary Segregation and Phase I. Docket 411, ¶ 27 at 14.

The Denial of Religious Counselors in Phase I and Disciplinary Segregation was Reasonably Related to a Legitimate Penological Interest

It is clear that inmates retain protections afforded by the First Amendment. *Pell v. Procunier,* 417 U.S. 817, 822, (1974). This includes the right to the free exercise of religion. *See, Cruz v. Beto,* 405 U.S. 319 (1972). However, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston,* 334 U.S. 266, 285 (1948).

"[T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security . . . 'Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Bell v. Wolfish,* 441 U.S. 520, 547-548 (1979) (citations and footnote omitted). Thus, in *Turner v. Safley,* 482 U.S. 788 (1987), the Supreme Court held that First Amendment rights of prisoners may be

regulated if the regulation is reasonably related to a legitimate penological goal. *See also Harper v. Wallingford,* 877 F.2d 728 (9th Cir. 1989).

The *Turner* court suggested several factors to consider in determining whether a challenged prison regulation is reasonable, including (1) whether the regulation has a logical connection to the legitimate government interests invoked to justify it; (2) whether alternative means of exercising the right on which the regulation impinges remain open to prison inmates; (3) the impact that accommodation of the asserted right will have on guards, other inmates, and the prison resources; and (4) the absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests. *See Turner,* 482 U.S. at 89-90.

As discussed *supra,* Phase I was designed to provide only constitutional minima. Granting preliminary injunctive relief, the Court has previously found constitutional minima to mean at least two hours a month with a religious counselor. *Memorandum in Support of Defendants' Motion for Summary Judgment* ("*Defendants' Memorandum*"), Docket 411 at 42; *Plaintiff's Motion in Opposition and Cross-Motion for Summary Judgment* ("*Plaintiff's Memorandum*"), Docket 417 at 25. Defendants have urged the court to reconsider. *Defendants' Memorandum,* Docket 411 at 42. This Court now applies the *Turner* factors to the facts herein.

Defendants do not submit that it was good corrections policy to deny religious clergy visits to all inmates. Docket 411, ¶ 27 at 14-15. However, those inmates in Disciplinary Segregation and Phase I of HHSF presented

special security and management problems which justified the exclusion of visitors. *Id.* This, coupled with the fact that confinement in Disciplinary Segregation and Phase I was temporary, and that the inmate could earn his way to Phase II where these visits were permitted, place the restriction in a somewhat different light than if religious visits were denied across-the-board. *Id.* Moreover, restrictions such as these promoted an important interest of SMCP, namely that inmates who wanted to have religious visitors had an incentive to improve their institutional behavior so as to be placed in a phase where these visits would be allowed. *Id.* When inmates are already in a high security prison, there are very few incentives which prison officials can offer. *Id.* if the court mandates the provision of a benefit without regard to security classification and housing, it takes away an important tool of corrections administrators. *Id.* Accordingly, this Court finds that denial of religious counselors in Phase I at HHSF at the time complained of in this action, and Disciplinary Segregation was reasonably related to legitimate penological interests and was, therefore, constitutionally permissible.

Accordingly, it is RECOMMENDED that Defendants' motion for summary judgment be GRANTED on this issue. It is also RECOMMENDED that Plaintiff's cross-motion for summary judgment be DENIED on this issue.

Sixth Amendment – Access to the Courts Claims

Plaintiff, in his original complaint, claims that lack of paper and photocopying has denied him access to the

courts. Plaintiff claims that Defendants' policy of allowing only two extra sheets of paper per day does not accommodate preparation of proper briefs or motions. Docket 2, ¶¶ 78-79 at 15. Plaintiff also claims that Defendants interfered with his access to the courts by depriving him of the opportunity to photocopy. Docket 2, ¶ 74 at 14; ¶¶ 77, 79 at 15. Plaintiff claims that those factors have caused additional hardship because he is an indigent and, therefore, cannot pay for his own photocopying. Docket 2, ¶¶ 80-81 at 15.

Plaintiff makes numerous additional factual allegations in his affidavit accompanying his cross-motion for summary judgment. This is because the lengthy duration of this case has enable [sic] Plaintiff to incorporate a number of additional claims into his case. *See Motion for Leave to Supplement the Complaint,* Docket 36; *Motion for Leave to Supplement an Amendment Complaint,* Docket 77; *Motion for Leave to Supplement a Amended Complaint,* Docket 327; *Motion for Leave to Supplement a Amend Complaint,* Docket 337. The additional Sixth Amendment claims relate to the prison policy regulating access to paper, access to photocopying, physical access to a law library, the amount of cell-retained legal materials, access to pens, free postage, and access to envelopes.

Plaintiff alleges denial of access to the courts because inmates in the phasing program were only permitted four writing papers at a time. Doc 417, ¶ 17 at 2; ¶ 246 at 32; ¶ 444 at 57; ¶ 576 at 71. Plaintiff could only get more paper by turning in his paper on a one-for-one basis. Docket 417, ¶ 232 at 31; ¶ 446 at 58. Further, Plaintiff could only get two additional sheets of paper per day. Docket 417, ¶ 80 at 11; ¶ 690 at 96. In addition to rules

governing day-to-day allocation of paper, Plaintiff's ability to purchase paper was regulated. Phase I inmates were not permitted to purchase writing paper from the commissary. Docket 417, ¶ 49 at 6; ¶ 79 at 11. Plaintiff also could not purchase paper while in Special Holding. Docket 417, ¶ 99 at 14. When Plaintiff was able to purchase paper, Defendants restricted inmates to one 50 page tablet at a time. Docket 417, ¶ 266-267 at 34. Plaintiff also claims that Defendants violated their own policy of providing free paper to indigent inmates. Docket 417, ¶ 227 at 30; ¶ 254 at 33; ¶ 635 at 81; *see* Docket 417, ¶ 450 at 58 (if funds were spent on other personal items, Defendants would not be issued free writing paper).

Further, Plaintiff alleges that Defendants' denial of photocopying privileges interfered with his access to the courts. Plaintiff claims that he was generally not permitted to make photocopies. Docket 417,¶ 29 at 4; ¶ 210, 212 at 29; ¶ 234 at 31; ¶ 500 at 60; *see* Docket 417, ¶ 452 at 59 (in 1985-1986 Defendants would not allow inmates to make photocopies of their legal papers); *see also* Docket 417, ¶ 453 at 59 (inmates were also prevented from making photocopies at their own expense). Plaintiff also claims he was denied free photocopying. Docket 417, ¶ 220 at 30. Plaintiff alleges actual injury based on Defendants' denial. Docket 417, ¶ 104 at 15 (restriction on photocopying caused him to miss appeal); ¶ 221 at 30 (Defendants lost motion to be photocopied); ¶ 581 at 72 (petition was returned because Plaintiff could not make photocopies); ¶ 622 at 79 (denied copies of civil complaints to serve Defendants).

Plaintiff also claims that the "paging" system, a system by which cases are photocopied for the inmate, was

inadequate for his research needs. Plaintiff claims that absent physical access to a law library and or mutual inmate legal assistance, he was denied access to the courts. Docket 417, ¶¶ 28, 30 at 4; ¶ 88 at 12; ¶¶ 102-106 at 15; ¶ 214 at 29; ¶¶ 241-242, 244, 247 at 32; ¶¶ 280-283 at 36; ¶¶ 286-287 at 37; ¶¶ 294-295, 298-299 at 38; ¶¶ 342-246 at 42; ¶¶ 381-382 at 49; ¶¶ 383-385, 388 at 50; ¶ 449 at 58; ¶¶ 581-582 at 72; ¶¶ 584-588 at 73; ¶¶ 590-591 at 74; ¶ 618 at 79; ¶ 825 at 123.

Plaintiff complains about the limits on cell-retained legal materials. Plaintiff claims that the prison policy which allows only two books and six case citations in the cell at any time denied him access to the courts. Docket 417, ¶ 591 at 74.

Plaintiff complains about the lack of sufficient access to pens and the denial of free postage. Plaintiff alleges that he was only allowed to use a pen Monday through Friday from 8:00 a.m. to 4:00 p.m. while in Phase I or Disciplinary Segregation. Document 417, ¶ 101 at 14. Plaintiff also claims that he was denied free postage for mailing court related documents. Docket 417, ¶ 29 at 4; ¶¶ 88-89 at 12; ¶¶ 104-105 at 15; ¶ 220 at 30. Plaintiff claims that he should not have been charged postage when he is indigent. Docket 417, ¶¶ 293, 296 at 38.

Finally, Plaintiff alleges the denial of access to the courts because inmates were given only two envelopes at a time. Docket 417, ¶ 17 at 2; ¶ 88 at 12; ¶ 104 at 15.

Inadequate Amounts of Paper

Defendants' Policy is Unnecessarily Burdensome

Plaintiff claims that Defendants' policy of limiting inmates to four sheets of paper a day with the possibility of two additional sheets of paper was an unconstitutional hindrance to his court access. Docket 417, ¶ 17 at 2; ¶ 80 at 11; ¶ 246 at 32; ¶ 444 at 57; ¶ 446 at 58; ¶ 576 at 71. Defendants' policy is clear and the factual allegations are consistent with that policy.

It is clear that such a policy does not, *per se*, deny Plaintiff's access to the courts. Plaintiff can and has managed to bring multiple suits in State and Federal court. Plaintiff's pleadings and documents number in the thousands. Based on the facts available, this Court cannot seriously entertain Plaintiff's allegation that Defendants' policy interfered with his ability to prepare proper briefs or motions.

However, neither can this Court agree with the soundness of Defendants' rigid restrictions on the amount of paper allowed inmates working on their legal motions. Inmates were basically allowed four pages of writing paper a day. They could request up to two additional pages of writing paper a day. Inmates could not get their allotment of four pages a day until they turned in their previous allotment on a one-for-one basis. Further, inmates could not buy more than one fifty page tablet of writing paper at a time, even if they were more prolific litigants. If an inmate can show that he needs more than six pages of writing paper a day, the prison should be flexible enough to accommodate any legitimate request for more writing paper.

This Court's opinion on the soundness of Defendants' policy regarding writing paper should not be interpreted as a blanket condemnation of Defendants' rules. Defendants' restrictions on Phase I and Special Holding inmates' commissary privileges served other legitimate penological interests connected with the good government and safety of the correctional facility. Further, where penological interests outweigh an inmates desire for more writing paper, Defendants should be given the discretion to decide whether to grant such a request.

Accordingly, it is RECOMMENDED that Defendants' indiscriminate policy of restricting inmates to only two additional pages of writing paper be ENJOINED. This Court finds:

1) inmates may be limited to four pages of writing paper a day;

2) inmates may be required to return their writing paper on a one-for-one basis in order to receive more paper;

3) Defendants' policy of limiting inmates to only two additional pages of writing paper a day is unnecessarily burdensome and serves no legitimate penological interest;

4) Defendants may, however, set a limit on how many additional sheets of writing paper an inmate is given at any one time.

Defendants are Entitled to Qualified Immunity

However, Defendants are entitled to qualified immunity on this issue. Plaintiff has not alleged that he was

prohibited from having writing paper. He is only dissatisfied with the amount of paper he was given.

Defendants' policy is intended to provide inmates with paper to write their pleadings. Allowing inmates the opportunity to file pleadings with the court fulfills the constitutional requirement of allowing access to the courts. This Court finds that Defendants have not violated any clearly established statutory or constitutional right.

Accordingly, this Court finds that Defendants are not liable for damages under 42 U.S.C. § 1983.

It is RECOMMENDED that Defendants' motion for a summary judgment be GRANTED on this issue. It is further RECOMMENDED that Plaintiff's cross-motion for summary judgment be DENIED on this issue.

Free photocopying

Plaintiff claims that he was denied free photocopying. Presently, the prison's policy is to debit Plaintiff's account for the copies he makes.

The Ninth Circuit has stated that despite the "individualized focus" of the actual injury inquiry, the Court "ha[s] not hesitated to reject constitutional claims of entitlement to resources which *no* prisoner could possibly require to have 'meaningful' access." *Sands v. Lewis*, 886 F.2d 1166, 1169 (9th Cir. 1989) (emphasis in original). As an example of such claims, the *Sands* Court discussed the right to free and unlimited photocopies. The Court stated,

> numerous courts have rejected any constitutional right to free and unlimited photocopying.

> *See Jones v. Franzen*, 697 F.2d 801, 803 (7th Cir. 1983) . . . ("[B]road as the constitutional concept of liberty is, it does not include the right to xerox."); *see also Wanninger v. Davenport*, 697 F.2d 992, 994 (11th Cir. 1983); *Johnson v. Parke*, 642 F.2d 377, 380 (10th Cir. 1981); *Harrell v. Keohane*, 621 F.2d 1059, 1060-1061 (10th Cir. 1980).

Id.

Plaintiff has failed to show that there is a genuine issue for trial. Accordingly, it is RECOMMENDED that Defendants motion for summary judgment be GRANTED on this issue. It is also RECOMMENDED that Plaintiff's cross-motion for summary judgment be DENIED on this issue.

Photocopying

Plaintiff claims that he was denied any opportunity to make photocopies. Docket 417, ¶ 29 at 4; ¶¶ 210, 212 at 29; ¶ 220 at 30; ¶ 453 at 59; ¶ 500 at 60; ¶ 581 at 72; ¶ 622 at 79. Defendants state that indigent inmates are and always have been given photocopying to pursue their legal matters. Docket 411, ¶ 16 at 10.

While Plaintiff is clearly not entitled to unlimited photocopying, neither are Defendants allowed to totally restrict Plaintiff's ability to make photocopies.

> Litigation necessarily requires some means of accurate duplication because the court and the parties need to refer to the same documents. Photocopying is a reasonable means of providing the necessary copies. *See Johnson v. Parke*, 642 F.2d 377, 380 (10th Cir. 1981) (explaining that it

would be "needlessly draconian" to require inmates to copy all documents by hand).

Gluth v. Kangas, 951 F.2d 1504, 1510 (9th Cir. 1991).

In this case Plaintiff alleges that Defendants generally did not permit him to make photocopies. Further, Plaintiff has alleged specific actual injury proximately caused by Defendants' denial of photocopying privileges.

Defendants are Not Entitled to Qualified Immunity

Defendants are not entitled to qualified immunity. Defendants are aware that they may not act, or fail to act, in such a manner as to deny Plaintiff his right to judicial redress. Defendants are also aware that filing motions with the court requires multiple copies of each motion. To require Plaintiff to type or handwrite each separate copy would be an unreasonable burden. Defendants have not offered any penological interest justifying such a measure, and this Court cannot imagine any.

This finding does not automatically mean that Plaintiff has proven a claim for damages under 42 U.S.C. § 1983. Plaintiff has made a general allegation. Such a general allegation without more is insufficient to attach liability to specific Defendants.

Accordingly, it is RECOMMENDED that Defendants' motion for summary judgment be DENIED on this issue. There appears to be a genuine issue of fact on this issue and therefore, it is RECOMMENDED that Plaintiff's cross-motion for summary judgment be DENIED.

"Paging" System/Law Library/Mutual Inmate Assistance

The Court has previously refused to address the issue of whether the HHSF "paging" system was unconstitutional. *Order Denying Plaintiffs' Motions for Summary Judgment and for Preliminary Injunction; Order Denying Defendants' Motion for Summary Judgment*, Civil No. 88-00577 HMF (D. Haw. March 31, 1989) ("*88-577 Order*"). In the *88-577 Order*, the Honorable Harold M. Fong, United States District Judge, stated,

> Plaintiffs ask the court to enter a judgment declaring defendants' library paging policy unconstitutional. The court need not and will not evaluate the constitutionality of defendants' paging policy because defendants have abandoned the paging policy and the claim that they can deny HHSF inmates direct physical access to a law library and thus the constitutionality of defendants' paging policy is a moot question.
>
> Generally, voluntary cessation of allegedly illegal conduct does not render a case moot. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 897 (1953). but, if "(1) it can be said with assurance that 'there is no reasonable expectation . . . ' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation," a case may become moot. *County of Los angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383 (1979) (citations omitted), *quoting, United States v. W.T. Grant Co.*, at 632, 73 S. Ct. at 897. The party alleging mootness bears a heavy burden of proof. *See United States v. W.T. Grant Co.*, at 633, 73 S. Ct. at 897.

> This Court finds that defendants' abandonment of their claim that they do not have to provide inmates with library access and their efforts to build a law library at the HHSF render the question of whether the paging system is unconstitutional moot. The court finds that by ordering books and establishing a law library at the HHSF, defendants have shown that there is no reasonable expectation that they will again claim that they do not have to provide inmates with direct access to a library. Accordingly, the court need not and will not consider the constitutionality of defendants' paging policy.

By the same analysis, this Court also declines to consider the constitutionality of Defendants' "paging" policy.

Plaintiff further complains that he was not allowed to engage in mutual inmate legal assistance. The law in this circuit is that mutual inmate legal assistance is not required where inmates have access to an adequate law library. *Storseth v. Spellman,* 654 F.2d 1349 (9th Cir. 1981).

One complaint which this Court previously found to have merit, is Plaintiff's direct physical access to a law library. This Court granted a preliminary injunction requiring that Plaintiff and Allen be given direct physical access to a law library. Docket 54. Subsequently, Defendants installed a law library at the HHSF and established policies for its use which this Court has found satisfy all constitutional requirements. *See 88-577 Order.* Therefore, any injunction is moot.

The only questions remaining on this issue are damages and qualified immunity. Plaintiff has not presented

any evidence which would substantiate damages. Until and unless he does so, damages cannot be assessed. *Carey v. Piphus,* 435 U.S. 247 (1978).

Defendants are Entitled to Qualified Immunity

Defendants denied direct library access when they began operating a "paging" system in 1981. *Defendants' Memorandum,* Docket 411 at 25. The complaint in this case was filed in May of 1986. More than a year after that an *Order Denying Preliminary Injunction* was issued in *Kahaleiwai v. Oku,* Civil Number 85-01503, stating "the procedures followed by the Defendant with respect to access to a law library, provision of postage and paper, and access to personal legal materials are consistent with procedures which have been found acceptable by other courts." Slip. op., September 30, 1987, at 7. Therefore, at the time of the alleged constitutional violations, the controlling federal law was not clearly established. Defendants' actions were undertaken in good faith and therefore, they are entitled to qualified immunity. *See Harlow, supra.*

Accordingly, it is RECOMMENDED that Defendants' motion for summary judgment be GRANTED on this issue. It is further RECOMMENDED that Plaintiff's cross-motion be DENIED on this issue.

Cell Retained Legal Material

Plaintiff complains about limits on cell-retained legal materials. A preliminary injunction has been issued in this case. *Report and Recommendation,* Docket 54 ("Docket

54"). Prior to the issuance of the preliminary injunction, inmates in the most restrictive phase of SMCP were allowed to retain in their cells two legal books and six citations. Docket 411, ¶ 15 at 9; Docket 417, ¶ 591 at 74. Notwithstanding Defendants' objections that excess paper creates security problems, the Court ordered that Plaintiff be allowed to keep up to a footlocker's worth of legal materials in his cell. Docket 54. Within a few weeks, weapons were found concealed in Plaintiff's papers. Docket 411, ¶ 15 at 9; Docket 417,¶ 519 at 74. Recognizing that Defendants were right after all, this Court modified its preliminary injunction to allow Defendants to restrict Plaintiff to two legal books and four inches of legal papers – essentially a return to the prior practice. *Order Granting Motion to Modify Preliminary Injunction,* Docket 300. This restriction does not deny Plaintiff access to the courts.

Accordingly, it is RECOMMENDED that DEFENDANTS' motion be GRANTED on this issue. It is further RECOMMENDED that PLAINTIFF'S cross-motion be DENIED on this issue.

Pens and Free Postage

Plaintiff complains about the availability of pens and the denial of free postage. It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them." *Bounds v. Smith,* 430 U.S. 817, 824 (1977). Courts have not read this language literally, but have held that prisons may impose reasonable regulations on the amount of free

postage and paper provided prisoner-litigants. *See, King v. Atiyeh,* 814 F.2d 565, 568 (9th Cir. 1987); *Twyman v. Crisp,* 584 F.2d 352, 359 (10th Cir. 1978) (citing cases). In *Twyman,* the Tenth Circuit approved a prison policy which allowed inmates to receive free postage for legal mail if they had less than $5.00 in their prison accounts, even where they had been granted leave to proceed in forma pauperis. *Id.,* 584 F.2d at 358-359.

Here, indigent inmates are and always have been given free postage to pursue their legal matters. Docket 411, ¶ 16 at 10. In addition, inmates need not be indigent, since they are paid to be in prison, even if they do not engage in any prison employment. *Id.* These funds are deposited to each inmate's account, may be used by the inmate to purchase items from the prison store. *Id.* This should normally suffice for pens, stamps and so forth. *Id.*

However, Defendants require inmates who have funds in their prison account to pay for postage even after a court has allowed them leave to proceed in forma pauperis. Docket 54 at 32; *Defendants' Memorandum,* Docket 411 at 32. Under *Twyman,* the policy of debiting accounts of indigent inmates for the cost of postage does not appear to violate the constitution.

As stated, *Bounds* also requires that Plaintiff be provided with a pen to draft legal documents. *Bounds,* 430 U.S. at 824. In Disciplinary Segregation and Phase I, inmates were only permitted to have pens during certain hours of the day when there are more guards on duty. Docket 411, ¶ 18 at 11. Specifically, Plaintiff could only use a pen Monday through Friday from 8:00 a.m. to 4:00 p.m. Document 417, ¶ 101 at 14.

The Court issued a preliminary injunction in which Plaintiff was allowed a pen until 10:00 p.m. Docket 54 at 34. Defendants claim that the Court misunderstood the testimony of Major Leonard Gonsalves during the preliminary injunction hearing where he stated that there would be "no security problem in allowing inmates to retain pens in their cells until 10:00 p.m." Docket 54 at 12. Defendants assert that pens are subject to abuse. Docket 411, ¶ 18 at 11. Defendants claim that they may be used as weapons, used by inmates to tattoo themselves, and used to conceal contraband. *Id.* Pencils are provided without restriction. *Id.* Although some may find it curious and anomalous that this is the practice, pencils cannot be used to tattoo, they cannot be used for the concealment of contraband, and their length can be controlled by the guards. *Id.* Since inmates always have access to a pencil, and since this Court accepts pencil pleadings, Plaintiff has not been denied access to the federal courts by virtue of any restrictions on pens. Further, this Court finds that 40 hours of pen use each week is more than adequate to vindicate his claims in any state court proceedings.

However, Plaintiff further claims that prior to October 5, 1987, he was denied the use of a pen altogether. Docket 417, ¶ 88 at 12; ¶ 101 at 14; ¶¶ 104-105 at 15; ¶ 216 at 29. Plaintiff claims that because he did not have a pen with which to draft his pleadings, his state court petition for post conviction relief was denied. Docket 417 ¶ 104 at 15. Thus, Plaintiff has alleged a specific actual injury proximately caused by Defendants' denial of a pen.

Defendants are Not Entitled to Qualified Immunity on the Pen Issue

Defendants are not entitled to qualified immunity. When Plaintiff was denied a pen, Defendants were aware that their actions would be violating a clearly established constitutional right of access to the state courts. Defendants have not offered any penological interest justifying a complete denial of a pen.

This finding does not automatically mean that Plaintiff has proven a claim for damages under 42 U.S.C. § 1983. Plaintiff has made a general allegation. Such a general allegation without more is insufficient to attach liability to specific Defendants.

Accordingly, it is RECOMMENDED that DEFENDANTS' motion be GRANTED on all issues except on the issue of whether Plaintiff was denied access to the courts prior to October 5, 1987 because he was denied the use of a pen. It is further RECOMMENDED that PLAINTIFF'S cross-motion be DENIED on these issues.

Envelopes

Plaintiff complains that an insufficient number of envelopes were given to indigent inmates. At the hearing on the present motion, Plaintiff testified that this problem no longer exists. Plaintiff's testimony at hearing on November 20, 1992. Therefore, injunctive relief is moot. Plaintiff states that the only issue to be determined is the amount of damages. *Id.*

Defendants are Entitled to Qualified Immunity

Defendants are entitled to qualified immunity on this issue. Plaintiff has not alleged that he was prohibited from receiving envelopes. Indigent inmates are and always have been given free envelopes to pursue their legal matters. Docket 411, ¶ 16 at 10. Plaintiff is only dissatisfied with the number of envelopes he was given.

Defendants' policy is intended to provide inmates with envelopes to mail their court documents. The fact that Plaintiff is only given two envelopes at a time does not rise to the level of a constitutional violation. Allowing inmates the opportunity to file pleadings with the court fulfills the constitutional requirement of allowing access to the courts. This Court finds that Defendants have not violated any clearly established statutory or constitutional right.

Accordingly, this Court finds that Defendants are not liable for damages under 42 U.S.C. § 1983.

It is RECOMMENDED that Defendant's motion for summary judgment be GRANTED on this issue. It is further RECOMMENDED that Plaintiff's cross-motion for summary judgment be DENIED on this issue.

Eighth Amendment – Denial of Sufficient Outdoor Exercise

The claim discussed herein was not raised in the original complaint. Instead, in his affidavit accompanying his cross-motion for summary judgment, Plaintiff alleges that he was denied sufficient outdoor exercise. Plaintiff

alleges that inmates in Phase I and Disciplinary Segregation received, at most, 45 minutes each week of outdoor recreation time. Docket 417, ¶ 23 at 3; ¶ 174 at 24; ¶ 364 at 46; ¶ 775 at 111; ¶ 815 at 122; ¶¶ 821-822 at 123.

Prisoners have a distinct constitutional right to outdoor exercise. *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979). In *Spain*, the Ninth Circuit affirmed the district court's order finding that "the denial of fresh air and regular outdoor exercise and recreation constituted cruel and unusual punishment" and ordering prison officials to provide inmates with outdoor exercise of one hour per day, five days a week "unless inclement weather, unusual circumstances or disciplinary needs ma[ke] that *impossible.*" *Id.* (emphasis supplied).

The *Spain* court emphasized the significance of outdoor recreation for inmates when it stated, "some form of regular outdoor exercise is *extremely important* to the psychological and physical well being of the inmates." *Id.* (emphasis supplied). The *Spain* court explicitly rejected the state's argument that restrictions on outdoor exercise were justified to protect prison staff and inmates from violent attacks, to insure against escape, and to minimize costs or inconvenience to the prison. *Spain*, 600 F.2d at 200. The court reasoned that "[t]hese concerns justify not permitting plaintiffs to mingle with the general prison population but do not explain why other arrangements [for outdoor exercise] were not made." *Id.* Recent Ninth Circuit cases reaffirm the principle enunciated in *Spain*. *E.g., McKinney v. Anderson*, 924 F.2d 1500, 1507 (9th Cir. 1991) ("In *Spain*, we held that denying prisoners fresh air and opportunities for regular outdoor exercise violates the Eighth Amendment.")

In *Ruiz v. Estelle*, 679 F.2d 1151, 1152 (5th Cir. 1982) (upholding a district court decree allowing all prisoners one hour of exercise a day if confined in administrative segregation for more than 3 consecutive days), the court stated that a number of facts must be assessed in determining what amount of exercise an inmate requires:

> Of particular importance in determining a inmate's need for regular exercise are the size of his cell, the amount of time the inmate spends locked in his cell each day, and the overall duration of his confinement. These together with the inmate's physical and other needs must be determined on the facts of each case . . .

Defendants are Not Entitled to Qualified Immunity

The factors set out in *Ruiz* have not been developed in the case at bar. Because the record does not adequately address all issues necessary to determine whether Defendants violated clearly established law, this court cannot grant qualified immunity at this time.

Accordingly, it is RECOMMENDED that both Plaintiff's motion and Defendants' cross-motion for summary judgment be DENIED on this issue.

Fourteenth Amendment – Denial of Due Process Claims

Plaintiff, in his original complaint, claims that Defendants denied him due process by returning him to Phase I status after being released from Disciplinary Segregation without giving him notice or a hearing on his placement in Phase I. Docket 2, ¶ 5 at 2.

Plaintiff makes more numerous and detailed claims in his affidavit accompanying his cross-motion for summary judgment. *See Plaintiff's Memorandum,* Docket 417. Plaintiff's claims relate to failure to give notice of hearings, failure to have hearings, denial of his opportunity to be heard, failure to summarize findings relied upon for any sanction imposed, failure to provide periodic review of his phasing program classification, and failure to provide notice of the rules proscribing expected conduct of inmates.

Plaintiff claims that he was not given notice of any hearing. Docket 417, ¶ 657 at 85; ¶ 659 at 85; ¶ 762 at 109; ¶ 8 at 2 (phase I inmates do not have 24 hour notice of hearing); ¶ 110 at 16; ¶ 202 at 28. Although it is unclear what hearing Plaintiff is referring to, it appears that he complains about lack of due process regarding his continued confinement in Phase I.

Plaintiff also complains that he was not given a hearing on his continued placement in Phase I. Docket 417, ¶ 689 at 96. Plaintiff claims that he was subjected to punitive sanctions without benefit of any kind of hearing. Docket 417, ¶ 359 at 45; ¶ 7 at 2 (Phase I inmates are locked down for virtually 24 hours with no hearing). Plaintiff's third area of complaint is that the committee members who sat on his Phase I hearings were biased. Docket 417, ¶ 373 at 48; ¶ 195 at 27 (Plaintiff requested the identities of the committee members).

Plaintiff complaints that he was not given any opportunity to be heard when a Phase I committee imposed sanctions. Docket 417, ¶ 657, 659 at 85; ¶ 762 at 109. Plaintiff also complains that Phase I inmates could not

attend any hearing concerning confinement. Docket 417, ¶ 6 at 2; ¶ 357 at 45 (cannot attend or defend himself). Plaintiff claims that he could not cross-examine any adverse witnesses or present evidence. Docket 417, ¶ 8 at 2; ¶ 110 at 16. Further, Plaintiff complains that he was not given a reason why he was not allowed to attend hearings. Docket 417, ¶ 116 at 17.

Plaintiff further complains that Phase I inmates were not given a written summary of the findings relied upon when sanctions were imposed. Docket 417, ¶ 9 at 2; ¶ 39 at 5 (inmates in all phases are never given a written summary on any segregation imposed); ¶ 111 at 16 (has not seen an investigation report or written summary of the reasons relied upon for confinement from over 10 months); ¶ 114 at 17 (only informed of sanction to be imposed); ¶ 199 at 27 (has requested to know why he was not given reasons for his confinement); ¶ 657, 659 at 85. Plaintiff claims that he was supposed to be given reasons for his classification scoring. Docket 417, ¶ 761 at 109. Plaintiff also claims that he was not given reasons why he was considered an exceptional case for classification purposes. Docket 417, ¶ 762 at 109.

Plaintiff complains that Phase I inmates were denied administrative review of their status. Docket 417, ¶ 110 at 16. Plaintiff complaints that he does not know why he was not entitled to review of his Phase I status. Docket 417, ¶ 198 at 27. Further, Plaintiff claims that inmates were not always given a review every 30 days. Docket 417, ¶ 660 at 85.

Finally, Plaintiff complains about his placement in Phase I confinement, generally. Plaintiff claims that

Defendants knew their phasing program was illegal. Docket 417, ¶ 121 at 18. Plaintiff also complains that he did not know what standard of conduct was required of him while in Phase I confinement. Docket 417, ¶ 358 at 45 (denied copy of the rules proscribing conduct of inmates); ¶ 698 at 91 (has a state created right to know what standard of behavior is expected of him); ¶ 732 at 104 (document describing proper conduct by inmates); ¶ 779 at 112 (does not know what kind of behavior is expected in order to progress in the phasing program).

Plaintiff Has No Liberty Interest in His Placement

Generally, Plaintiff's claims assert that he was not given due process in regard to his continued placement in Phase I. Plaintiff was placed into SMCP merely by virtue of being classified as a maximum security inmate and being placed in the maximum security prison. All inmates are given a review and notice in connection with reclassification as a maximum security inmate. The classification process is outlined in Hawaii Administrative Rules, §§ 17-201-1 through 3. Inmates get notice after the classification decision and may appeal. § 17-201-3.

Any claim that Plaintiff must receive due process in connection with movement through each of the phases must fail because no liberty interest has been implicated.

An inmate is entitled to the procedural protection afforded by the due process clause only when prison personnel seek to take action against him that infringes a "liberty interest." An inmate's liberty interest may arise from the due process clause itself or from state law. *Hewitt v. Helms*, 459 U.S. 460, 466 (1983); *Toussaint v.*

McCarthy, 801 F.2d 1080, 1089 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 2462 (1987). The due process clause itself does not create a protectable liberty interest for state prisoners as long as the conditions of their confinement do not otherwise violate the Constitution. *Hewitt*, 459 U.S. at 468; *Brennan v. Cunningham*, 813 F.2d 1, 5 (1st Cir. 1987); *Caldwell v. Miller*, 790 F.2d 589, 604 (7th Cir. 1986). Conditions at HHSF, while restrictive, met constitutional minima. Thus no liberty interest arises from the due process clause itself.

Cases from the United States Supreme Court and the courts of appeals involving claims of state law liberty interests have always turned upon an analysis of specific statutes or rules in order to determine whether they contain "explicitly mandatory language in connection with requiring specific substantive predicates" for state action. *Hewitt*, 459 U.S. at 472. As the Ninth Circuit has stated:

> A state may create a constitutionally protected liberty interest by establishing regulatory measures that impose substantive limitations on the exercise of official discretion. *Hewitt v. Helms* (citation omitted). To establish a protected interest, a prisoner must show " 'that particularized standards or criteria guide the state's decision makers.' " *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (Brennan, J., concurring)). There must be "objective and defined criteria" which the decision maker is required to respect. *Ibid.*

Baumann v. Arizona Dept. of Corrections, 754 F.2d 841, 844 (9th Cir. 1985). The Ninth Circuit reiterated this test in *Toussaint* stating:

> Before we will recognize a constitutionally protected liberty interest, state law must direct that a given action will be taken or avoided only on the existence or nonexistence of specified substantive predicates.

Toussaint, 801 F.2d at 1094. Procedural regulations themselves do not create substantive liberty interests. *Olim v. Wakinekona*, 461 U.S. 238, 250-251 (1983).

State statutes create no liberty interest with respect to an inmate's place of incarceration. In *Spencer and Rapozo v. Sunn*, Civil Nos. 80-0348 and 80-0349 (slip op. dated March 11, 1981), the Honorable Samuel P. King stated:

> Plaintiffs are convicted felons who were sentenced to imprisonment in the custody and control of the director of the Department of Social Services and Housing . . . Under HRS section 706-672,the director "shall determine the proper program of redirection and any subsequent place of confinement best suited to meet the individual needs of the committed person." This language gives the director unlimited discretion as far as where an inmate is to be confined. This is bolstered by HRS section 353-3 which states that the director "shall have the entire government, control and supervision of state correctional facilities" including the "care, control, treatment, furlough and discipline of persons committed to his care . . . "

Slip Opinion at 2. Both the Supreme Court of Hawaii, and the United States Supreme Court have also reviewed

Hawaii statutes and regulations and found no liberty interest implicating placement in a particular facility or portion thereof. *Lono v. Ariyoshi*, 621 P.2d 976 (Haw. 1981); *Olim v. Wakinekona, supra.*

The regulations applicable to Plaintiff's confinement at HHSF are contained in Title 17, Hawaii Administrative Rules. In addition, HHSF promulgated other policies and procedures and inmate guidelines which were not published in the Hawaii Administrative Rules, all of which are on record in this case. None of these regulations created any expectation of advancement through the phases, nor were there "particularized standards of criteria [to] guide the State's decision makers" when determining whether to advance or retain an inmate at a particular phase. The determination was wholly in the discretion of social workers and counselors who monitored the inmate and made an educated guess as to whether he could function under a less restrictive regimen. Clearly, no liberty interest was created by these rules.

Plaintiff has not shown that process was due him under the Fourteenth Amendment where he was placed in Phase I after being released from Disciplinary Segregation. Any process that was due must have been provided when Disciplinary Segregation was imposed. In this case, Plaintiff has not claimed that he was denied due process when Disciplinary Segregation was imposed. Plaintiff has not shown that there is a genuine issue for trial.

Defendants are Entitled to Qualified Immunity

Defendants are also entitled to qualified immunity with regard to Plaintiff's claims. Plaintiff's claim of entitlement to due process protections is meritless in this case. According to the Hawaii Administrative Rules Plaintiff was not entitled to any kind of hearing when he was moved from Disciplinary Segregation to Phase I. Prison procedure regarding SMCP dictated that inmates who were released from Disciplinary Segregation were automatically placed in Phase I. Further, it is clear from Plaintiff's exhibits submitted that he was not denied 30 day review of his status.[4]

Accordingly, it is RECOMMENDED that Defendants motion for summary judgment be GRANTED on this issue. It is further RECOMMENDED that Plaintiff's cross-motion for summary judgment be DENIED on this issue.

---

[4] Ex. 4096 (30 day review conducted on July 23, 1986, and next review tentatively scheduled for August 23, 1986); Ex. 28 (Program Committee conducted an early review); Ex. 5327 (Plaintiff placed in phase I on March 7, 1989, with next review scheduled for April 2, 1989); Ex. 40 (placed in phase I on March 10, 1990, and next review tentatively scheduled for April 10, 1990); Ex. 4086 (placed in phase I on June 23, 1986, and next review tentatively scheduled for July 23, 1986); Ex. 4085 (placed in phase I on April 3, 1986, and next review tentatively scheduled for May 3, 1986); Ex. 4090 (placed in phase I on May 12, 1988, and next review tentatively scheduled for June 11, 1988); Ex. 4089 (placed in phase I on April 24, 1988, and next review tentatively scheduled for May 18, 1988); Ex. 4088 (placed in phase I on April 4, 1988, and next review tentatively scheduled for May 4, 1988).

Recommendations

It is recommended that Defendants' motion for summary judgment be granted on the following issues:

1) Plaintiff's claim that his First Amendment rights were abridged because he was denied religious materials.

2) Plaintiff's claim that his First Amendment rights were abridged because he did not have religious counseling while in Phase I or Disciplinary Segregation.

3) Plaintiff's claim that he was denied access to the courts because he was not given an adequate amount of paper.

4) Plaintiff's claim that he was denied access to the courts because he was denied free photocopying.

5) Plaintiff's claim that he was denied access to the courts because the "paging" system was inadequate, and he was not allowed mutual inmate assistance or physical access to a law library.

6) Plaintiff's claim that he was denied access to the courts because he was not allowed enough cell retained property.

7) Plaintiff's claim that he was denied access to the courts because he was denied free postage and adequate access to a pen after October 5, 1987.

8) Plaintiff's claim that he was denied access to the courts because he was denied a sufficient number of envelopes.

9) Plaintiff's claim that he was denied due process in the implementation of the phasing program.

It is recommended that Defendants' motion for summary judgment be denied on the following issues:

1) Plaintiff's claim that he was denied access to the courts because he was prevented from photocopying.

2) Plaintiff's claim that he was denied access to the courts because he was denied the use of a pen prior to October 5, 1987.

3) Plaintiff's claim that he was denied sufficient outdoor exercise while in Phase I and Disciplinary Segregation.

It is recommended that Plaintiff's cross-motion for summary judgment be denied.

It is recommended that Defendants' policy of restricting inmates to only two additional pages of writing paper be ENJOINED pursuant to the terms elaborated *supra*.

DATED: Honolulu, Hawaii, Apr. 06, 1993

/s/ Francis I. Yamashita
Francis I. Yamashita
United States Magistrate Judge

APPENDIX "D"

Hawaii Circuit Court Rule (Haw. Cir. Ct. R.)

RULE 33. PROCEDURES IN THE CIRCUIT COURT OF THE FIRST CIRCUIT FOR PROCESSING POST-CONVICTION PRISONER DOCUMENTS [SUSPENDED]

Publisher's Note

Rule 33 has been suspended indefinitely by Order dated July 12, 1988. The text of that Order follows this Rule.

(a) Submission to Office of Clerk; Docketing; SPP Number [Suspended]. All written or typed POST TRIAL prisoner pleadings, correspondence, applications or requests mailed to, delivered to, or received by any court, judge, the public defender, the prosecuting attorney, or the chief clerk of the circuit court, shall be transmitted to the documents section of the first circuit court for processing. All such prisoner documents shall be received as public documents and no such documents shall be considered or treated as "confidential," "private," "personal," etc. Each document received by the documents section shall be docketed and filed under an SPP (Special Proceeding – Prisoner) number and a separate file shall be established for each document, provided, however, that there shall be one, and only one, SPP number for each prisoner so that all subsequent post-trial documents by the same prisoner shall be filed in the same SPP number.

(b) Non-complying Documents; Transmittal Letters [Suspended]. If the document received by the documents section does not substantially comply with the requirements of FORM A and FORM B attached to these

rules, the documents section shall return the same to the prisoner by a transmittal letter in a form approved by the administrative judge of the criminal division. All documents which comply with FORM A shall hereafter be styled and referred to as the "Petition." No prisoner document shall receive any further processing consideration by the court, unless and until the prisoner conforms his document with the requirements of FORM A (and FORM B, if applicable) and said document has attained the status of a "Petition."

(c) Referral to Public Defender; Determination by Public Defender and Filing of Pleading Form [Suspended]. In any case where the prisoner requests a court appointed counsel or intends to proceed pro se, the documents section shall transmit a copy of the Petition to the public defender by a transmittal letter (in a form approved by the administrative judge of the criminal division) for initial processing. The public defender shall:

(1) Determine whether the Petition is or is not meritorious.

(2) Determine whether the public defender will represent the prisoner, or is not able to represent the prisoner.

(3) File a pleading form with the documents section containing its determination of (1) and (2) above within 10 days of receipt of the transmittal letter.

(d) Court Determination; Further Pleadings; Hearing; Decision [Suspended]. After the initial processing determination by the public defender under Rule (c)(3) has been filed, the documents section shall forthwith

transmit the SPP file to the administrative judge of the criminal division, and the administrative judge shall assign the SPP case file to a criminal division trial judge for disposition as follows:

(1) If the determination of the public defender is that the Petition is not meritorious, the trial judge shall make an independent determination whether the Petition is or is not meritorious. In the event the trial judge determines that the matter is not meritorious, he shall so enter an order and that order shall terminate the consideration of that SPP case file at the trial level, and the prisoner's only remaining remedy is to appeal the decision of the trial judge to the supreme court.

(2) If the determination of the public defender is that the Petition is meritorious, and in the event the trial judge determines that the matter is meritorious, and files an order to that effect, a filed copy of the Petition shall be served upon the prosecuting attorney. If the prisoner is represented by counsel, service shall be effected by counsel's delivery of the filed copy to the prosecuting attorney and filing of proof of service. If the prisoner is not represented, the clerk of court shall effect service by mailing a copy of the Petition to the prosecuting attorney. Within 30 days after service of the Petition, the prosecuting attorney shall file his responsive pleading. The hearing shall be set by the trial judge within 14 days after the filing of the responsive pleading by the prosecuting attorney and the prosecuting attorney as well as the prisoner shall be given the opportunity to participate in said hearing. The public defender shall represent the prisoner, and if the public defender is unable to represent the prisoner, the

administrative judge shall appoint private counsel to represent the prisoner.

(3) After due and proper hearing upon the merits of the Petition, the trial judge shall render his decision and a written order shall be filed.

(e) Non-applicability of Rule [Suspended]. In any case where a prisoner has a retained or appointed counsel who directly presents a post-conviction pleading under Rule 40 of the Rules of Penal Procedure, the provisions of this rule other than subsection (a) shall not apply.

(f) Pretrial Prisoner Documents [Suspended]. The procedures in this Rule 33 shall apply only to post-trial proceedings. Pretrial matters are handled exclusively by the trial lawyers, and all pretrial documents from prisoners shall be referred to counsel for the defendant prisoner. The courts, judges and the office of the chief clerk shall have no responsibility over any pretrial prisoner documents, other than as required under the Rules of Penal Procedure.

(g) Pleadings to be Filed [Suspended]. The following pleadings shall be filed in the SPP case file:

(1) The original written document from the prisoner.

(2) The public defender's determination as to whether the matter is or is not meritorious, and whether the public defender will or is not able to represent the prisoner.

(3) Appointment of the public defender or private counsel to represent the prisoner.

(4) The order by the court determining whether the Petition is or is not meritorious.

(5) The order of the court disposing of the Petition after hearing.

(6) *Optional Pleading.* Affidavit and memorandum in support and in opposition to the Petition may be filed.

[Adopted effective July 13, 1984; suspended indefinitely July 12, 1988.]

Hawaii Rule Penal Procedure (Haw. R. Pen. P.)

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

RULE 40. POST-CONVICTION PROCEEDING

(a) Proceedings and Grounds. The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis; provided that the foregoing shall not be construed to limit the availability of remedies in the trial court or on direct appeal. Said proceeding shall be applicable to judgments of conviction and to custody based on judgments of conviction, as follows:

(1) *From Judgment.* At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:

(i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawaii;

(ii) that the court which rendered the judgment was without jurisdiction over the person or the subject matter;

(iii) that the sentence is illegal;

(iv) that there is newly discovered evidence; or

(v) any ground which is a basis for collateral attack on the judgment.

For the purposes of this rule, a judgment is final when the time for direct appeal under Rule 4(b) of the Hawaii Rules of Appellate Procedure has expired without appeal being taken, or if direct appeal was taken, when the appellate process has terminated, provided that a petition under this rule seeking relief from judgment may be filed during the pendency of direct appeal if leave is granted by order of the appellate court.

(2) *From Custody.* Any person may seek relief under the procedure set forth in this rule from custody based upon a judgment of conviction, on the following grounds:

(i) that sentence was fully served;

(ii) that parole or probation was unlawfully revoked; or

(iii) any other ground making the custody, though not the judgment, illegal.

(3) *Inapplicability.* Said proceeding shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived. An issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at

the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify his failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

(b) Institution of Proceedings. A proceeding for post-conviction relief shall be instituted by filing a petition with the clerk of the court in which the conviction took place. The clerk shall then docket the petition as a special proceeding, and in cases of pro se petitions, promptly advise the court of the petition.

(c) Form and Content of Petition. The petition shall be in substantially the form annexed to these rules. Petitions in the prescribed form shall be made available without charge by the clerks of the various circuit and district courts to applicants upon their request. The petition shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handprinted and shall be signed and sworn to by the petitioner.

[*Publisher's Note: This last paragraph of Rule 40(c) has been suspended indefinitely by Order dated June 12, 1988. The text of that Order follows this Rule.*] If a petition received by

the clerk of a circuit or district court does not substantially comply with the requirements of this rule, a judge of the court shall direct the clerk to return the same to the petitioner together with a statement of the reason or reasons for its return. The clerk shall retain a copy of the petition.

(d) Response. The State of Hawaii shall be named as the respondent in the petition, and the petitioner shall serve the petition on the respondent by delivering a filed copy thereof to the prosecutor. Service may be made by the attorney for the petitioner, or the petitioner in a pro se case. Within 30 days after the service of the petition or within such further time as the court may allow, the respondent shall answer or otherwise plead. The respondent shall file with its answer any records that are material to the questions raised in the petition which are not included in the petition.

(e) Amendment and Withdrawal of Petition. The court may grant leave to amend or withdraw the petition at any time. Amendment shall be freely allowed in order to achieve substantial justice. No petition shall be dismissed for want of particularity unless the petitioner is first given an opportunity to clarify his petition.

(f) Hearings. If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer. However, the court may deny a hearing if the petitioner's claim is patently frivolous and is without trace of support either in the record or from other evidence submitted by the petitioner. The court may also deny a hearing on a specific question of fact

when a full and fair evidentiary hearing upon that question was held during the course of the proceedings which led to the judgment or custody which is the subject of the petition or at any later proceeding.

The petitioner shall have a full and fair evidentiary hearing on the petition. The court shall receive all evidence that is relevant and necessary to determine the petition, including affidavits, depositions, oral testimony, certificate of any judge who presided at any hearing during the course of the proceedings which led to the judgment or custody which is the subject of the petition, and relevant and necessary portions of transcripts of prior proceedings. The petitioner shall have a right to be present at any evidentiary hearing at which a material question of fact is litigated.

Where the petition alleges the ineffective assistance of counsel as a ground upon which the requested relief should be granted, the petitioner shall serve written notice of the hearing upon the counsel whose assistance is alleged to have been ineffective and said counsel shall have an opportunity to be heard.

(g) Disposition. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceeding, or with respect to custody based on such judgment, and such supplementary orders as to rearraignment, retrial, custody, bail, discharge or other matters as may be necessary or proper. The court shall state its findings of fact and conclusions of law in entering its judgment on the petition.

(h) Review. Any party may appeal to the supreme court from a judgment entered in the proceeding in accordance with Rule 4(b) of the Hawaii Rules of Appellate Procedure.

(i) Indigents. If the petition alleges that the petitioner is unable to pay the costs of the proceedings or to afford counsel, the court shall refer the petition to the public defender for representation as in other penal cases; provided that no such referral need be made if the petitioner's claim is patently frivolous and without trace of support either in the record or from other evidence submitted by the petitioner.

(j) Procedures in the Circuit Court of the First Circuit [Suspended]. [*Publisher's Note: Rule 40(j) has been suspended indefinitely by Order dated June 12, 1988. The text of that Order follows this Rule.*] In the circuit court of the first circuit, post-conviction documents submitted by prisoners shall be governed when applicable by Rule 33 of the Circuit Courts.

[Amended effective August 1, 1983; July 13, 1984; June 3, 1985; July 12, 1988; November 21, 1989.]

Supplemental Interim Procedures for the Treatment of Post-Conviction Pleadings

ORDER SUSPENDING CIRCUIT COURT RULE 33, HRPP RULE 40(j) AND THE LAST PARAGRAPH OF HRPP RULE 40(c) AND ESTABLISHING SUPPLEMENTAL INTERIM PROCEDURES FOR THE TREATMENT OF POST-CONVICTION PLEADINGS

IT IS HEREBY ORDERED that Rule 33 of the Rules of the Circuit Courts, Rule 40(j) of the Hawaii Rules of Penal Procedure, and the last paragraph of Rule 40(c) of the Hawaii Rules of Penal Procedure are suspended indefinitely. The interim procedures set forth in this order shall supplement the provisions of HRPP Rule 40 until otherwise ordered by this court.

The official post-conviction form found in the Appendix of the Hawaii Rules of Penal Procedure remains the proper form to be used when seeking post-conviction relief from an allegedly illegal judgment or allegedly illegal "custody based upon a judgment." HRPP Rule 40(c). However, where a post-conviction pleading deviates from the official form, *e.g.*, is mislabeled as a petition for writ of habeas corpus, *see* HRPP Rule 40(a), the pleading shall nevertheless be accepted for filing and shall be treated as a petition under HRPP Rule 40, so long as the post-conviction pleading (1) claims illegality of a judgment or illegality of "custody" or "restraint" arising out of a judgment, (2) is accompanied by the necessary filing fee or by a well-founded motion for waiver of the filing fee or request to proceed in forma pauperis, and (3) meets minimum standards of legibility and regularity. *See* 3 C. Wright, *Federal Practice & Procedure: Criminal 2d* § 591, at 425 (habeas corpus petitions filed in sentencing court

by federal prisoners treated as motions under the federal prisoner post-conviction statute, 42 U.S.C. 2255).

When treating a nonconforming pleading as a Rule 40 petition, the trial court shall promptly clarify by written order that Rule 40 procedures apply and shall further require the State to respond pursuant to Rule 40(d). If the information supplied in the pleading is incomplete, the court in its order may sua sponte require the petitioner to complete the official Rule 40 form as a supplement to the pleading, before requiring the State to respond. If it appears that the petitioner may be unable to effect prompt service of a filed copy of the pleading or supplemental pleading upon the State pursuant to Rule 40(d), the court in its order may direct the court staff to effect service on behalf of the petitioner. Where the pleading makes a showing of entitlement to immediate relief, the court may shorten the time in which the State is required to respond to the pleading.

The circuit court in its discretion may require the proceeding to be numbered, or renumbered, under the same S.P.P. number as any previous Rule 40 petitions submitted by the same respondent.

Any hearing shall be governed by Rule 40(f). Appeal may be had as provided in Rule 40(h).

If a post-conviction pleading alleges neither illegality of judgment nor illegality of post-conviction "custody" or restraint but instead alleges a cause of action based on a civil rights statute or other separate cause of action, the court shall treat the pleading as a civil complaint not governed by Rule 40 post-conviction procedures. However, where a pleading seeks relief in the nature of Rule

40 relief and simultaneously pleads a separate claim or claims under a civil rights statute or other separate cause of action, the latter claim(s) may be dismissed from the Rule 40 proceeding, without prejudice.

DATED: Honolulu, Hawaii, July 12, 1988.

APPENDIX

FORM OF PETITION FOR POST-CONVICTION RELIEF

(Rule 40, HRPP)

Name _____

Prison Number _____

Place of Confinement _____

Case No. _____ (to be supplied by Clerk of the Court)

State of Hawaii,

v.

_____

(full name of petitioner)

PETITION TO VACATE, SET ASIDE, OR CORRECT JUDGMENT OR TO RELEASE PETITIONER FROM CUSTODY

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury.

All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt, your petition will be filed if it is in proper order. No fee is required with this petition.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a petition of this type, you may request permission to proceed in forma pauperis in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court and judge may be challenged in a single petition. If you seek to challenge judgments entered by different judges or divisions either in the same court or in different courts, you must file separate petitions as to each such judgment.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the Court in which the conviction was entered whose address is [to be stamped in by the Clerk]

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack _____

2. Date of judgment of conviction _____

3. Length of sentence _____

4. Nature of offense involved (all counts) _____

_____

_____

5. What was your plea? (Check one)

   (a) Not guilty ___
   (b) Guilty ___
   (c) Nolo contendere ___

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

_____

_____

6. Kind of trial: (Check one)

(a) Jury ___
(b) Judge only ___

7. Did you testify at the trial?

Yes ___ No ___

8. Did you appeal from the judgment of conviction?

Yes ___ No ___

9. If you did appeal, answer the following:

(a) Result _____
(b) Date of result _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court?

Yes ___ No ___

11. If your answer to 10 is "yes," give the following information:

(a) (1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ___ No ___

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ___ No ___

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ___ No ___

(d) Did you appeal, to the Supreme Court of Hawaii, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ___ No ___
(2) Second petition, etc. Yes ___ No ___
(3) Third petition, etc. Yes ___ No ___

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not.

_____

_____

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings.

Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this petition all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use or coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seisure [sic].

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: _____

_____

Supporting FACTS (tell your story **briefly** without citing cases or law): _____

_____

_____

B. Ground two: _____

_____

Supporting FACTS (tell your story **briefly** without citing cases or law): _____

_____

_____

C. Ground three: _____

_____

Supporting FACTS (tell your story **briefly** without citing cases or law): _____

_____

_____

D. Ground four: _____

_____

Supporting FACTS (tell your story **briefly** without citing cases or law): _____

_____

_____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state **briefly** what grounds were not so presented, and give your reasons for not presenting them:

_____

_____

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ___ No ___

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgments attached herein:

(a) At preliminary hearing _____

_____

(b) At arraignment and plea _____

_____

(c) At trial _____

_____

(d) At sentencing _____

_____

(e) On appeal _____

_____

(f) In any post-conviction proceeding _____

_____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

_____

16. Were you sentenced on more than one count of a charge or an indictment, or on more than one charge or indictment, in the same court and at approximately the same time?

Yes ___ No ___

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ___ No ___

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

_____

(b) And give date and length of sentence to be served in the future: _____

_____

(c) Have you filed, or do you contemplate filing any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ___ No ___

Wherefore, petitioner prays that the Court grant him all relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____
(date)

_____
Signature of Petitioner

IN FORMA PAUPERIS DECLARATION

_____
[Insert appropriate court]

State of Hawaii	)	DECLARATION IN
	)	SUPPORT OF REQUEST TO
v.	)	PROCEED IN FORMA
_____	)	PAUPERIS
(Petitioner)	)	

I, ___, declare that I am the petitioner in the above entitled case; that in support of my petition to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes ___ No ___

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____

   _____

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received. _____

   _____

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment?

      Yes ___ No ___

   b. Rent payments, interest or dividends?

      Yes ___ No ___

   c. Pensions, annuities or life insurance payments?

      Yes ___ No ___

   d. Gifts or inheritances?

      Yes ___ No ___

   e. Any other sources?

      Yes ___ No ___

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. _____

_____

_____

3. Do you own any cash, or do you have money in a checking or savings account? (Include any funds in prison accounts.)

Yes ___ No ___

If the answer is "yes," state the total value of the items owned. _____

_____

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ___ No ___

If the answer is "yes," describe the property and state its approximate value. _____

_____

_____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

_____

_____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____
(date)

_____
Signature of Petitioner

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $___ on account to his credit at the ___ institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said ___ institution:

_____

_____

_____
Authorized Officer of Institution

[Adopted effective August 1, 1983.]

No. 94-1400

(3)

Supreme Court, U.S.
FILED
APR 6 = 1995
CLERK

In The

Supreme Court of the United States

October Term, 1994

TED SAKAI, Administrator,
Halawa Correctional Facility in his
Official and Individual Capacity, *et al.*,

Petitioners,

vs.

TERRY SMITH, *et al.*,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITIONERS' SUPPLEMENTAL MEMORANDUM

MARGERY S. BRONSTER
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
First Deputy Attorney General
State of Hawaii
**Counsel of Record*

Department of the Attorney
General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1292

*Counsel for Petitioners
Ted Sakai, Administrator,
Halawa Correctional Facility,
in his Official and Individual
Capacities, et al.*

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No. 94-1400

In The

Supreme Court of the United States

October Term, 1994

TED SAKAI, Administrator,
Halawa Correctional Facility in his
Official and Individual Capacity, *et al.*,

Petitioners,

vs.

TERRY SMITH, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' SUPPLEMENTAL MEMORANDUM

On March 1, 1995, the Court of Appeals denied Petitioners' petition for rehearing and rejected Petitioners' suggestion of the appropriateness of rehearing en banc. The Ninth Circuit also issued a modified opinion, which is reprinted, together with the order denying rehearing, in the attached Appendix ("App.") "E." This memorandum addresses the impact of the Ninth Circuit's action on this Petition. Petitioners submit that the Ninth Circuit's action, which affects the reasoning of its denial of summary judgment on Respondent's claims under *Bounds v.*

Smith, 430 U.S. 817 (1977), only highlights why certiorari should be granted in this case.

FURTHER REASONS WHY CERTIORARI SHOULD BE GRANTED

1. The Ninth Circuit's order denying rehearing and rejecting the suggestion of the appropriateness of en banc review leaves nothing further to be done in the Court of Appeals with respect to the legal issues presented by the Petition. This Court's action is now called for.

2. The principal modification to the Ninth Circuit's opinion, insofar as the issues under *Bounds v. Smith*, 430 U.S. 817 (1977), raised by this Petition are concerned, goes only to the Ninth Circuit's acceptance of Petitioners' contention that the panel's jurisdiction-disavowing rationale for not reaching the "merits" of Respondent's *Bounds* claim conflicts with this Court's reasoning in *Siegert v. Gilley*, 500 U.S. 226 (1991). *See* Pet. for Cert. at 16-17, 19. The Ninth Circuit did not, however, apply its jurisdiction-disavowing theory across the board in its first opinion, *see id.* at 20-24, and the Ninth Circuit's modification of its rationale for upholding the District Court's denial of summary judgment only exposes more cleanly the *Bounds* issues here. *See generally* App. "E" at "E-5"-"E-6" (amendment to opinion (following *Siegert* rationale)).

3. The Ninth Circuit attempts to explain away the conflict it creates with decisions such as *Hudson v. Robinson*, 678 F.2d 462 (3d Cir. 1982), on the basis that this case concerns a "refus[al] to file" court papers as a result of state action, rather than an instance where the inmate

" 'submitted the document later than he would have liked but prior to the date it was due' " (also allegedly as a result of state action). *See* App. "E" at E-21 n.11. This purported distinction, however, simply makes no sense. Indeed, Hawaii provided far more "access to the courts" than in *Robinson*, for in this case the inmate's papers actually *got* to the court, and were returned, whereas in *Robinson* during the period of delay court personnel never even were able to see what the inmate was attempting to file. Plainly the decision below creates a gaping conflict in the Circuits, one that should be reviewed by this Court at this time.

4. The Ninth Circuit's amended opinion also attempts to explain away its novel ruling that *Bounds* creates the right to file frivolous pleadings. Addressing Petitioners' arguments that its judgment conflicts with decisions such as *McDonald v. Smith*, 472 U.S. 479 (1985), the Ninth Circuit asserts that the lack of constitutional protection for frivolous filings "would permit, for instance, a state court to dismiss frivolous claims and sanction the litigants who present them," but should "not allow prison officials to deny inmates the opportunity to present their claims to the courts," even if, as in this case, the claims are undisputably frivolous. *See* App. "E-22" at n.12. We submit that this formulation of the law is deeply wrong, and merits this Court's review. To be sure, prison officials should not take lightly their duty to grant "adequate" access to the courts, as *Bounds* requires, but it is no answer to the Petitioners' invocation of *McDonald v. Smith* and the long line of cases it relies upon to say that an inmate has a federal cause of action when the pleadings the inmate seeks to file enjoy no constitutional protection

at all. The simple answer to the Ninth Circuit's modified opinion is that prison officials act at their peril if they mistakenly deny access to an inmate with a nonfrivolous claim. The prophylactic rule adopted by the Ninth Circuit makes nonsense of this Court's precedents, and wrongly encourages frivolous litigation.

CONCLUSION

For the foregoing reasons and those stated in the Petition, certiorari and the relief prayed for in the Petition for Certiorari should be granted at the earliest opportunity by this Court.

Dated: Honolulu, Hawaii, April 5, 1995.

Respectfully submitted,

MARGERY S. BRONSTER
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
First Deputy Attorney General
State of Hawaii
*Counsel of Record
Department of the
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1292

Counsel for Petitiones Ted Sakai, Administrator, Halawa Correctional Facility, in his Official and Individual Capacities, et al.

APPENDIX "E"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN ALLEN; TERRY SMITH,

Plaintiffs-Appellees.

v.

TED SAKAI; HAROLD FALK; JOHN CABRAL; CLAYTON FRANK; ADELE FUJITA; LEONARD GONSALVES; LEIANN KAJMIKAUA; GARY KAPLAN; GERALD MENDIOLA; CINDA SANDIN; FRANCIS SEQUIERA; LAURENCE SHOHET; WILLIAM OKU; MALCOLM LEE; TERRENCE ALLEN; and RAY SUENAGA, in their official and individual capacities,

Defendants-Appellants.

No. 93-16780

D.C. No. CV-86-00577-ACK

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND REJECTING EN BANC SUGGESTION

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, Chief District Judge, Presiding

Argued and Submitted
October 3, 1994 – Pasadena, California

Filed November 15, 1994
Amended Opinion Filed March 1, 1995

Before: Betty B. Fletcher, and Ferdinand F. Fernandez, Circuit Judges, and John W. Sedwick,* District Judge.

Opinion by Judge Fletcher

ORDER

The opinion filed November 15, 1994 is amended as follows:

Slip op. at 13860: Insert before first full paragraph (The last sentence of insert is first sentence of first full paragraph):

> An Eighth Amendment claim that a prison official has deprived inmates of humane conditions of confinement must meet two requirements, one objective and one subjective. *Farmer v. Brennan*, ___ U.S. ___, 114 S. Ct. 1970, 1977 (1994). Under the objective requirement, the prison official's acts or omissions must deprive an inmate of " 'the minimal civilized measure of life's necessities.' " *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The subjective requirement, relating to the defendant's state of mind, requires deliberate indifference. *Farmer*, ___ U.S. at ___, 114 S. Ct. at 1979.
>
> We conclude that Smith has met the objective element of the Eighth Amendment analysis by alleging the deprivation of a basic human need. *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

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* Hon. John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

Slip op. at 13861-62: Replace first full paragraph on page 13861 and following paragraph that spans pages 13861-62, including footnote 5, with:

> Smith's incarceration in SHU was indefinite and therefore potentially long-term, and under admittedly "harsh" conditions. After *Spain* and *Toussaint*, defendants cannot legitimately claim that their duty to provide regular outdoor exercise to Smith was not clearly established. Smith has met the objective requirement of the Eighth Amendment analysis by alleging the deprivation of what this court has defined as a basic human need.[5]
>
> Smith has also adduced sufficient evidence of the subjective prong to defeat summary judgment. The defendants acknowledge that HHSF had a goal of providing five hours exercise per week and that, despite their awareness of this goal, they knowingly failed to provide outdoor recreation to Smith. Thus, this is not a case where the defendants claim that they were unaware of either the circumstances resulting in the alleged deprivation or the likelihood that the deprivation would occur. *See Farmer*, ___ U.S. at ___, 114 S. Ct. at 1982 (permitting officials to avoid liability under the Eighth Amendment by

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[5] Defendants also argue that *Spain* is inapplicable to cases involving neither a complete nor long-term denial of outdoor exercise. They note that the plaintiffs in *Spain* had been deprived completely of outdoor exercise for four years and as a matter of prison policy, whereas Smith's claim is that, for six weeks, he was permitted out of his cell only weekly. Although the length and severity of the alleged illegal conduct may be critical questions at trial, they are not dispositive at the summary judgment stage.

proving they were unaware of facts causing deprivation or believed that risk of deprivation was unlikely).

The defendants attempt to excuse the deprivation by explaining that logistical problems made it difficult to provide adequate exercise. According to the defendants, scheduling an inmate's time in the exercise yard was difficult because, for security reasons, inmates had to be accompanied to the recreation yard by a guard and only one inmate could use the recreation yard at a time. We recognize that the practical difficulties that arise in administering a prison facility from time to time might justify an occasional and brief deprivation of an inmate's opportunity to exercise outside. However, we cannot accept the defendants' vague reference to logistical problems as necessarily justifying, as a matter of law at the summary judgment stage, the deprivation that took place here. A rational fact-finder after hearing the evidence might determine that the defendants acted with at least deliberate indifference to Smith's basic human needs, as defined by *Spain*, by placing inconsequential logistical concerns that might be no more than matters of convenience above Smith's need for exercise. *See Harris v. Angelina County*, 31 F.3d 331, 335-36 (5th Cir. 1994) (practical difficulties to mitigating prison overcrowding did not establish as a matter of law that prison officials had not acted with deliberate indifference when officials were aware of the conditions and had available alternative avenues to address the conditions).

Because Smith has alleged a violation of clearly established law, we affirm the district

court's denial of defendants' motion for summary judgment on Smith's Eighth Amendment claim.

Slip op. at 13865-66: Replace the second full paragraph on page 13865 and the first two paragraphs on page 13866, and footnotes 10-12 with:

Defendants also urged that they are entitled to summary judgment on the ground of qualified immunity because Smith has failed to make an adequate showing that the denial of photocopying services and the use of a pen actually prejudiced his right of access to the courts. A prisoner asserting a "non-core" violation of *Bounds* must allege an "actual injury" resulting from denial of his right to court access. *Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994); *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989). Because Smith does not challenge the adequacy of a law library or alternative sources of legal knowledge, he must identify "some specific instance in which [he] was actually denied access to the courts." *Id.* (quotations and citations omitted).

As an initial matter, we must decide whether this issue is properly before us in an interlocutory appeal from the denial of the defendants' claim of qualified immunity. A defendant cannot inject into an interlocutory appeal issues that are otherwise not immediately appealable. *See Abney v. United States*, 431 U.S. 651, 662-63 (1977) ("such claims are appealable if, and only if, they too fall within *Cohen's* collateral-order exception to the final-judgment rule").

"A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 132 (1991). Thus, we must determine whether Smith has made an adequate showing of "actual injury" to court access as a necessary predicate to showing that the defendants violated a constitutional right.

Smith has identified two instances where the defendants' denial of photocopying services and the use of a pen resulted in the denial of his access to the courts. His right to court access was denied when the state court returned his second petition for post-conviction relief because he had not enclosed multiple copies. His right to court access was denied a second time when he attempted to appeal the district court's denial of the petition and the state court returned his notice of appeal unfiled because it was not completed in black ink. The court then dismissed the appeal as untimely.

The defendants argue that Smith's right to court access was not impaired by any deprivation of photocopying services because the state court eventually did consider his second petition for post-conviction relief.[10] We disagree. Smith was able to duplicate his petition and have it filed with the court, but not until *after* the state court refused to accept a single copy

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[10] Smith was able to refile the petition because the Hawaii Rules of Penal Procedure do not impose a filing deadline on petitions for post-conviction relief. *See* Haw. R. Pen. Proc. 40.

for filing. Once Smith submitted his petition to the court but filing was refused, he was injured.[11]

The defendants also argue that Smith's right to court access has not been impaired because his second petition for post-conviction relief and his appeal of its denial were meritless. Their argument misconstrues both the nature of the right protected by *Bounds* and the "actual injury" requirement. Inmates have an established right to present their legal claims to the courts and to have them considered *by the courts.*

All that *Sands* requires is a showing that the plaintiff could not present a claim to the courts because of the state's failure to fulfill its constitutional obligations. A prisoner need not show, ex post, that he would have been successful on the merits had his claim been considered. To hold otherwise would permit prison officials to substitute their judgment for the courts' and to interfere with a prisoner's right to court access

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[11] Thus, this case differs from *Hudson v. Robinson,* 678 F.2d 462, 466 (3d Cir. 1982), which we cited with approval in *Sands. See* 886 F.2d at 1170. In *Hudson,* the Third Circuit held that a plaintiff had not fulfilled the actual injury requirement when his only injury "was his being required on one occasion to wait ten days to have a document notarized. As a result, *he submitted the document later than he would have liked* but prior to the date it was due." 678 F.2d at 466 (emphasis added). Smith did not simply have to wait a few days to make photocopies and submit his petition to the court. He alleges that the defendants denied him access to photocopies altogether and that, as a result, the state court returned his petition, refusing to file it.

on the chance that the prisoner's claim would eventually be deemed frivolous.[12]

We agree with the district court that Smith's showing is adequate to defeat summary judgment: he has alleged conduct on the part of defendants that, if true, violates clearly established constitutional rights, defeating defendants' claims to qualified immunity.

With these revisions, the petition for rehearing is denied.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The Petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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[12] The defendants' reliance on *McDonald v. Smith*, 472 U.S. 479, 484 (1985), is wholly misplaced. In *McDonald*, the Court repeated the well accepted principle that the First Amendment right to petition does not protect frivolous litigation. *Id.* at 484 (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983)). Although this principle would permit, for instance, a state court to dismiss frivolous claims and sanction the litigants who present them, it would not allow prison officials to deny inmates the opportunity to present their claims to the courts. Moreover, the fact that damages properly assessed in a cause of action arising when a prison official denies court access to pursue a meritless claim would be nominal does not foreclose the cause of action, because the claim's merit is for a court, not a prison official to determine.

OPINION

FLETCHER, Circuit Judge:

Hawaii state prison officials, defendants in a 42 U.S.C. § 1983 suit, appeal the denial of summary judgment on their claim of qualified immunity. We affirm.

I

Terry Smith was transferred to the Special Holding Unit ("SHU")[1] of the Halawa High Security Facility ("HHSF")[2] after multiple disciplinary offenses ranging from counterfeiting documents to assault. Smith and others, proceeding *pro se*, filed a federal civil suit against various prison officials under 42 U.S.C. § 1983.[3] Defendants moved for summary judgment on the grounds that

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[1] Inmates at HHSF were subdivided into four categories or "phases," each with its own housing area in the facility. All new inmates were assigned to Phase I and resided in SHU, where they encountered the harshest conditions of confinement found at HHSF. With good behavior, inmates could advance to other phases and correspondingly more tolerable housing conditions. Smith was a Phase I inmate during the entire period covered by this lawsuit.

[2] On or about September 1991, the State of Hawaii converted HHSF into its special needs facility. It is no longer a maximum security facility, and Smith no longer resides there. Therefore, Smith's claims are for damages only.

[3] The original complaint alleged thirteen causes of action, and several new issues were raised in subsequent petitions for preliminary relief. During the lengthy course of this litigation, most of Smith's co-plaintiffs dropped out and several claims were dismissed. The only claims remaining on appeal concern alleged deprivations of Smith's constitutional rights.

they enjoyed qualified immunity and that the plaintiffs had failed to state a claim for which relief could be granted. The magistrate recommended that the defendants' motion be granted on all of Smith's claims except his claims that defendants deprived him of sufficient outdoor recreation, the use of a pen, and access to photocopies. The district court issued a written order modifying the magistrate's findings but adopting his recommendation to deny defendants' motion for summary judgment as to Smith's remaining three claims. Defendants filed a timely appeal of the district court's order.

II

Smith alleges that, for a six-week period during his longer confinement at SHU, the defendants violated his right to freedom from cruel and unusual punishment by providing him only 45 minutes per week of outdoor exercise. He also alleges that the defendants violated his right to access to the courts by depriving him of the use of a pen and photocopying services. The sole issue on appeal is whether the defendants were entitled as state officials at the summary judgment stage to dismissal on the ground of qualified immunity. Although a denial of summary judgment generally is not a "final order" over which this court has jurisdiction, 28 U.S.C. § 1291, a denial of qualified immunity may be reviewed under the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *see generally Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). We review de novo. *Act Up!/ Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

Defendants are entitled to qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Although a plaintiff must do more than offer conclusory allegations that the defendant violated a clearly established constitutional right, a public official is not entitled to qualified immunity when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

III

Smith alleges that the defendants violated his right to freedom from cruel and unusual punishment by depriving him of adequate outdoor exercise. Phase I inmates were confined to their cells almost twenty-four hours per day. Although prison officials assert HHSF had a goal of providing Phase I inmates with five hours of access per week to the facility's outdoor recreation area, they admit that during a six-week period Smith was permitted outside of his cell for outdoor recreation only 45 minutes per week.

An Eighth Amendment claim that a prison official has deprived inmates of humane conditions of confinement must meet two requirements, one objective and one subjective. *Farmer v. Brennan*, ___ U.S. ___, 114 S. Ct. 1970, 1977 (1994). Under the objective requirement, the prison official's acts or omissions must deprive an inmate of " 'the minimal civilized measure of life's necessities.' " *Id.*

(quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The subjective requirement, relating to the defendant's state of mind, requires deliberate indifference. *Farmer*, ___ U.S. at ___, 114 S. Ct. at 1979.

We conclude that Smith has met the objective element of the Eighth Amendment analysis by alleging the deprivation of a basic human need. *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991). Before the period in question, several circuits, including this one, had held that deprivation of outdoor exercise could constitute cruel and unusual punishment. *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979); *Davenport v. DeRobertis*, 844 F.2d 1310, 1314-15 (7th Cir.), *cert. denied*, 488 U.S. 908 (1988); *Ruiz v. Estelle*, 679 F.2d 1115, 1151-52, *vacated in part as moot*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Campbell v. Cauthron*, 623 F.2d 503, 507 (8th Cir. 1980). This court recognized in *Spain* that "some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates." *Spain*, 600 F.2d at 199. We emphasized that the plaintiffs were in long-term incarceration where they were in continuous segregation, generally spending twenty-four hours each day alone in their cells. *Id.* Under those conditions, deprivation of outdoor exercise constituted cruel and unusual punishment. *Id.; see also Toussaint v. Yockey*, 722 F.2d 1490, 1493 (9th Cir. 1984) (denial of outdoor exercise to inmates assigned to administrative segregation for over one year raised "substantial constitutional question").

Defendants' analogy to *LeMaire v. Maass*, 12 F.3d 1444, 1458 (9th Cir. 1993), is flawed. In *LeMaire* we found no constitutional violation from a termination of the plaintiff's exercise privileges "for considerable periods of

time" after he attacked two correctional officers with a weapon as he left the yard, then vowed to attack them again. Although Smith was placed in SHU at HHSF because of disciplinary infractions,[4] unlike the plaintiff in *LeMaire*, Smith did not lose his exercise privileges based on a determination by prison officials that he presented a "grave security risk when outside his cell" and that measures were necessary to deter violent behavior separating Smith from the rest of the population in SHU. *See LeMaire*, 12 F.3d at 1458.

Smith's incarceration in SHU was indefinite and therefore potentially long-term, and under admittedly "harsh" conditions. After *Spain* and *Toussaint*, defendants cannot legitimately claim that their duty to provide regular outdoor exercise to Smith was not clearly established. Smith has met the objective requirement of the Eighth Amendment analysis by alleging the deprivation of what this court has defined as a basic human need.[5]

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[4] We note that each of the plaintiffs in *Spain* had been charged with or convicted of violent acts in prison, including shared responsibility in an incident that resulted in the murder of three prison officers and two inmates. *Spain*, 600 F.2d at 192.

[5] Defendants also argue that *Spain* is inapplicable to cases involving neither a complete nor long-term denial of outdoor exercise. They note that the plaintiffs in *Spain* had been deprived completely of outdoor exercise for four years and as a matter of prison policy, whereas Smith's claim is that, for six weeks, he was permitted out of his cell only weekly. Although the length and severity of the alleged illegal conduct may be critical questions at trial, they are not dispositive at the summary judgment stage.

Smith has also adduced sufficient evidence of the subjective prong to defeat summary judgment. The defendants acknowledge that HHSF had a goal of providing five hours exercise per week and that, despite their awareness of this goal, they knowingly failed to provide outdoor recreation to Smith. Thus, this is not a case where the defendants claim that they were unaware of either the circumstances resulting in the alleged deprivation or the likelihood that the deprivation would occur. *See Farmer*, ___ U.S. at ___, 114 S. Ct. at 1982 (permitting officials to avoid liability under the Eighth Amendment by proving they were unaware of facts causing deprivation or believed that risk of deprivation was unlikely).

The defendants attempt to excuse the deprivation by explaining that logistical problems made it difficult to provide adequate exercise. According to the defendants, scheduling an inmate's time in the exercise yard was difficult because, for security reasons, inmates had to be accompanied to the recreation yard by a guard and only one inmate could use the recreation yard at a time. We recognize that the practical difficulties that arise in administering a prison facility from time to time might justify an occasional and brief deprivation of an inmate's opportunity to exercise outside. However, we cannot accept the defendants' vague reference to logistical problems as necessarily justifying, as a matter of law at the summary judgment stage, the deprivation that took place here. A rational fact-finder after hearing the evidence might determine that the defendants acted with at least deliberate indifference to Smith's basic human needs, as defined by *Spain*, by placing inconsequential logistical

concerns that might be no more than matters of convenience above Smith's need for exercise. *See Harris v. Angelina County*, 31 F.3d 331, 335-36 (5th Cir. 1994) (practical difficulties to mitigating prison overcrowding did not establish as a matter of law that prison officials had not acted with deliberate indifference when officials were aware of the conditions and had available alternative avenues to address the conditions).

Because Smith has alleged a violation of clearly established law, we affirm the district court's denial of defendants' motion for summary judgment on Smith's Eighth Amendment claim.

IV

Defendants also maintain that they are entitled to summary judgment on the ground of qualified immunity on Smith's claims that they violated his right of access to the courts under *Bounds v. Smith*, 430 U.S. 817 (1977). Smith claims that prison officials denied him access by refusing to photocopy his court papers despite his willingness to pay and by providing only a pencil, rather than a pen.[6]

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[6] To the extent that Smith's claims rested on allegations that prison officials denied him *free* photocopies, the magistrate recommended that the defendants' motion for summary judgment be granted on this claim. In respect to the pen claim, during some of the time Smith was housed in SHU, the facility had a policy forbidding the use of pens by inmates except from 8:00 a.m. to 4:00 p.m. on weekdays. The magistrate determined that forty hours per week of pen use was sufficient to fulfill Smith's right of access to the courts and recommended that the district

Both of Smith's right of access claims arise from his difficulties in filing papers in the state court in connection with his second attempt to obtain post-conviction relief. Smith's first petition for post-conviction relief had been denied. Proceeding *pro se*, Smith attempted to file a second petition for post-conviction relief. The court returned the petition because Smith did not submit two additional copies. Smith claims that this failure was due to the defendants' refusal to make photocopies for him at a later time. Smith was able to refile the petition pursuant to Hawaii Rules of Penal Procedure, Rule 40, which provides that a petition for post-conviction relief may be filed at any time after judgment. The state trial court ultimately dismissed the petition as meritless.

Smith attempted to appeal the dismissal. However, because his notice of appeal was completed in pencil rather than in "black ink" as required by Rule 3 of the Circuit Court Rules, the court returned it to Smith for correction. Smith did not refile the notice of appeal until the time period for doing so had expired, and the Hawaii Supreme Court ultimately dismissed the appeal because of Smith's failure to file a timely notice of appeal. Smith claims that HHSF's ban on pens caused his failure to use black ink on his first timely presented notice of appeal.

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court grant the defendants' motion for summary judgment to the extent that Smith's claims rested on this policy. Smith did not object to these recommendations and does not appeal the district court's order adopting them.

A

At the time defendants allegedly deprived Smith of the use of a pen and access to photocopying, the Supreme Court had clearly established an inmate's right of access to the courts, including a right to services and supplies indispensable to filing court documents. *See Bounds*, 430 U.S. 817; *Wolff v. McDonnell*, 418 U.S. 539 (1974). Although this court had not yet held that "some means of accurate duplication" is an essential component of an inmate's right of access to the courts, *see Gluth v. Kangas*, 951 F.2d 1504, 1508-10 (9th Cir. 1991), other circuits had. *See, e.g., Jones v. Franzen*, 697 F.2d 801 (7th Cir. 1983) (inmate states valid claim against prison officials if he shows that prison's photocopy policy impeded court access); *Johnson v. Parke*, 642 F.2d 377, 380 (10th Cir. 1981) (denial of photocopies unconstitutional to extent it actually infringed inmate's right of access to courts).[7]

Moreover, it does not require sophisticated "legal scholarship" to know that a plaintiff's access [sic] the courts could be hindered seriously by an inability to make multiple, accurate copies of legal documents. *See Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986) (public officials not charged with "the kind of legal scholarship normally associated with law professors and

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[7] In the absence of preexisting binding precedent within this circuit, this court "look[s] at all available decisional law including decisions . . . of other circuits" to determine whether a plaintiff has shown that the illegality of a defendant's conduct should have been apparent when it occurred. *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989).

academicians," but with the knowledge of a reasonable person), *cert. denied,* 483 U.S. 1020 (1987).

Similarly, the defendants should have known that they had a duty to provide Smith with a pen for preparing court documents. The Supreme Court had recognized prison officials' "indisputable" duty to provide inmates access to "paper and pen to draft legal documents." *Bounds,* 430 U.S. at 824. Although the defendants emphasize that their ban on the use of pens was necessary to fulfill legitimate penological interests,[8] *Bounds* makes clear that an inmate's right of access to the courts is "fundamental" and places upon prison officials an "affirmative obligation [ ] to assure all prisoners meaningful access to the courts." 430 U.S. at 828, 824. Although the state may "choose among the avenues of access," the avenue it chooses must "satisfy its constitutional obligation" under *Bounds, Storseth v. Spellman,* 654 F.2d 1349, 1353 (9th Cir. 1981).

Hawaii's Circuit Court Rule 3(a) requires that all "handwritten entries on papers shall be in black ink," and defendants concede that this mandate was "clear and explicit" and provided no exceptions. In light of the clarity of the pre-existing law, it should have been apparent to the defendants that a ban on the use of pens would seriously hamper an inmate's access to the courts and

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[8] They maintain that inmates have used pens as weapons, to conceal contraband, and to tattoo themselves. Pencils, on the other hand, cannot be used to tattoo or to conceal contraband, and guards can reduce their effectiveness as weapons by controlling their length.

therefore constitute a violation of his rights under *Bounds*.[9]

Apparently, defendants initially thought Smith had refused the assistance of the Public Defender's office. However, they essentially concede on appeal that Smith sought assistance but that the office declined to represent him. Thus any reliance defendants seek to place on *Storseth*, which held that a prisoner had not been denied access if he had rejected counsel, is misplaced. Absent evidence that Smith voluntarily and knowingly waived the assistance of counsel, the defendants are not excused from providing Smith the tools required to have meaningful access to the courts as a *pro se* litigant.

B

Defendants also urge that they are entitled to summary judgment on the ground of qualified immunity because Smith has failed to make an adequate showing

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[9] Defendants argue that pens and photocopies were not necessary for Smith to have a meaningful access to the courts, despite the fact that both the "black ink" and multiple copies requirements were explicit and provided no clear exceptions. Defendants would require Smith to move the trial court to exempt him from the requirement or seek a writ of mandamus from the Hawaii Supreme Court ordering the Court documents Supervisor to file his notice of appeal. They argue that the state courts should be expected to be "solicitious of inmate litigation" and therefore willing to exempt an inmate from procedural rules that are difficult to meet in light of prison regulation. These arguments, however, seem to confirm that the complete denial of a pen and photocopies made it "very difficult or impossible" for Smith to exercise his right to court access. *See Johnson v. Parke*, 642 F.2d 377, 380 (10th Cir. 1981).

that the denial of photocopying services and the use of a pen actually prejudiced his right of access to the courts. A prisoner asserting a "non-core" violation of *Bounds* must allege an "actual injury" resulting from denial of his right to court access. *Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994); *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989). Because Smith does not challenge the adequacy of a law library or alternative sources of legal knowledge, he must identify "some specific instance in which [he] was actually denied access to the courts." *Id.* (quotations and citations omitted).

As an initial matter, we must decide whether this issue is properly before us in an interlocutory appeal from the denial of the defendants' claim of qualified immunity. A defendant cannot inject into an interlocutory appeal issues that are otherwise not immediately appealable. *See Abney v. United States*, 431 U.S. 651, 662-63 (1977) ("such claims are appealable if, and only if, they too fall within *Cohen's* collateral-order exception to the final-judgment rule").

"A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 132 (1991). Thus, we must determine whether Smith has made an adequate showing of "actual injury" to court access as a necessary predicate to showing that the defendants violated a constitutional right.

Smith has identified two instances where the defendants' denial of photocopying services and the use of a

pen resulted in the denial of his access to the courts. His right to court access was denied when the state court returned his second petition for post-conviction relief because he had not enclosed multiple copies. His right to court access was denied a second time when he attempted to appeal the district court's denial of the petition and the state court returned his notice of appeal unfiled because it was not completed in black ink. The court then dismissed the appeal as untimely.

The defendants argue that Smith's right to court access was not impaired by any deprivation of photocopying services because the state court eventually did consider his second petition for post-conviction relief.[10] We disagree. Smith was able to duplicate his petition and have it filed with the court, but not until *after* the state court refused to accept a single copy for filing. Once Smith submitted his petition to the court but filing was refused, he was injured.[11]

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[10] Smith was able to refile the petition because the Hawaii Rules of Penal Procedure do not impose a filing deadline on petitions for post-conviction relief *See* Haw. R. Pen. Proc. 40.

[11] Thus, this case differs from *Hudson v. Robinson*, 678 F.2d 462, 466 (3d Cir. 1982), which we cited with approval in *Sands*. *See* 886 F.2d at 1170. In *Hudson*, the Third Circuit held that a plaintiff had not fulfilled the actual injury requirement when his only injury "was his being required on one occasion to wait ten days to have a document notarized. As a result, *he submitted the document later than he would have liked* but prior to the date it was due." 678 F2d. at 466 (emphasis added). Smith did not simply have to wait a few days to make photocopies and submit his petition to the court. He alleges that the defendants denied him access to photocopies altogether and that, as a result, the state court returned his petition, refusing to file it.

The defendant also argue that Smith's right to court access has not been impaired because his second petition for post-conviction relief and his appeal of its denial were meritless. Their argument misconstrues both the nature of the right protected by *Bounds* and the "actual injury" requirement. Inmates have an established right to present their legal claims to the courts and to have them considered *by the courts.*

All that *Sands* requires is a showing that the plaintiff could not present a claim to the courts because of the state's failure to fulfill its constitutional obligations. A prisoner need not show, ex post, that he would have been successful on the merits had his claim been considered. To hod otherwise would permit prison officials to substitute their judgment for the courts' and to interfere with a prisoner's right to court access on the chance that the prisoner's claim would eventfully be deemed frivolous.[12]

We agree with the district court that Smith's showing is adequate to defeat summary judgment: he has alleged

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[12] The defendants' reliance on *McDonald v. Smith*, 472 U.S. 479, 484 (1985), is wholly misplaced. In *McDonald*, the Court repeated the well accepted principle that the First Amendment right to petition does not protect frivolous litigation. *Id.* at 484 (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983)). Although this principle would permit, for instance, a state court to dismiss frivolous claims and sanction the litigants who present them, it would not allow prison officials to deny inmates the opportunity to present their claims to the courts. Moreover, the fact that damages properly assessed in a cause of action arising when a prison official denies court access to pursue a meritless claim would be nominal does not foreclose the cause of action, because the claim's merit is for a court, not a prison official to determine.

conduct on the part of defendants that, if true, violates clearly established constitutional rights, defeating defendants' claims to qualified immunity.

V

Smith has alleged facts which, if true, would establish that the defendants violated clearly established law defining Smith's right to outdoor exercise and his right to access the courts. The district court's denial of defendants' motion for summary judgment is affirmed.

AFFIRMED.